SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 364

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, APPELLANT,

vs.

THE CITY OF SEATTLE AND HARRY W. CARROLL, AS COMPTROLLER, ETC.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

INDEX

	Original	Print
Record from superior court of King County	1	1
Amended complaint	1	1
Exhibit "A"—Ordinance providing for license or occupation tax	17	14
Demurrer	31	25
Judgment	32	26
Order allowing appeal	33	27
Bond on appeal (omitted in printing)	34	
Clerk's certificate (omitted in printing)	36	
Proceedings in supreme court of Washington	37	28
Opinion, Blake, J	37	28
Dissenting opinion, Steinert, J	45	36
Order denying petition for rehearing	53	42
Judgment	54	42
Petition for appeal	55	43
Assignments of error and prayer for reversal	59	46
Order allowing appeal	82	48
Supersedeas bond on appeal (omitted in printing)	84	
Citation and service (omitted in printing)	87	
Proof of service	90	50
Præcipe for transcript of record	91	50
Clerk's certificate (omitted in printing)	93	
Statement of points to be relied upon and designation as to record	94	51

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 22, 1933

[fols. a & 1]

IN SUPERIOR COURT OF KING COUNTY

No. 254,908

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corporation, and Harry W. Carroll, as Comptroller of the City of Seattle, Defendants

AMENDED COMPLAINT—Filed Oct. 17, 1932

Comes now the plaintiff, The Pacific Telephone and Telegraph Company, and, with permission of the court, files this, its amended complaint, and for cause of action against the defendants alleges:

I

That plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of California; that it has complied with all the laws of the State of Washington, relating to foreign corporations, has paid its annual license fee last past due and all other fees required to be paid by it under the laws of the State of Washington and is duly authorized to do business therein.

II

That during all of the times referred to in this complaint, plaintiff has owned and operated, and now owns and operates, a telephone and telegraph system, and has been and is now engaged in operating and conducting a public telephone and telegraph system in the State of Washington and in the States of California, Oregon and a part of Idaho, furnishing to the public telephone exchange service and both intrastate and interstate telephone toll service and telegraph service.

[File endorsement omitted.]

Copy of within received Oct. 17, 1932. A. C. Van Soelen, Corporation Counsel.

[fol. 2]

III

That the defendant The City of Seattle is a municipal corporation organized under the laws of the State of Washington; that the defendant Harry W. Carroll is the duly elected, qualified and acting comptroller of the City of Seattle.

IV

That on May 23, 1932, the city council of the City of Seattle passed Ordinance No. 62662, entitled:

"An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges, defining offenses and providing penalties."

which said ordinance was on May 25, 1932, approved by the acting mayor of said city, and on May 31, 1932, was published in the Daily Journal of Commerce; that a copy of said ordinance is hereto attached marked Exhibit "A" and by this reference made a part of this complaint.

V

The State of Washington, under tariffs approved by the Department of Public Works of the State of Washington, is divided into a number of exchange areas. Telephone exchange service is service between telephone stations within the same exchange area, and telephone toll service is telephone service between telephone stations located in different exchange areas. Among said exchange areas in the State of Washington is the "Seattle Exchange"; but which said last mentioned exchange area includes several thousand telephone stations (the exact number in 1931 being unknown to this plaintiff) outside the limits of the City of Seattle. Said telephone exchange service and intrastate telephone toll service together constitute the major portion of plaintiff's telephone service within the State of Wash-
[fol. 3] ington. Telegraph service is both intrastate and interstate, and intrastate telegraph service is service between points within the State of Washington.

VI

That by authorization of the Department of Public Works of Washington given prior to 1931, and in pur-

suance of its statutory powers, the Seattle Exchange was duly established by plaintiff prior to 1931; that the Seattle Exchange as established and at all times since maintained embraces an area including the City of Seattle and the territory immediately adjacent thereto.

VII

That the Interstate Commerce Commission in pursuance of its statutory powers has prescribed the form of accounts to be kept by telephone companies, subject to the Act to Regulate Commerce as amended (41 Stat. L. 474) and in particular in accordance with Section 20 of said Act as amended; that plaintiff is one of the telephone companies in the United States subject to said Act and is required by law to keep its accounts in the form prescribed by the Interstate Commerce Commission; that the Department of Public Works of the State of Washington by order No. 5251, dated October 31, 1921, has adopted and has prescribed for all telephone companies subject to its jurisdiction the same form of accounts as that adopted and prescribed by the Interstate Commerce Commission.

VIII

That in order for plaintiff to furnish its customers receiving exchange service in the Seattle Exchange with telephone exchange service, as hereinbefore defined, it is necessary for plaintiff to provide equipment known as "Central Office Equipment," that the term "Central Office Equipment" is defined both by the Interstate Commerce Commission and by the regulatory body of the State of Washington, as follows:

[fol. 4] "Central Office Telephone Equipment.—This account should include the cost of local and toll switchboards, chief operators', monitors', and supervisors' desks and tables, wire chiefs' testing outfits, main and intermediate frames, cables and jumper wires, call registers or meters, relay racks and coil racks, and power plants, including rectifiers, generators, engines, motors, batteries, power switchboards, meters and fuse boards; telephone and telegraph instruments, and other electrical instruments and apparatus in the central office devoted to the operation of the telephone plant."

IX

That without the use of central office equipment, it is impossible for plaintiff to render any telephone exchange service at all; that the investment by said plaintiff in central office equipment located wholly inside the city limits of Seattle is in excess of $10,000,000; that in order to render economical and efficient telephone exchange service to its customers receiving exchange service in the Seattle Exchange, it is necessary for plaintiff to run its wires or cables to some point, same being the wire center point within various districts within the Seattle Exchange, and which wires and cables are connected to the central office equipment owned and operated by plaintiff in the Seattle Exchange; that said districts are known as central office districts and are eleven in number; that in order for plaintiff's customers receiving exchange service in any one of said districts to communicate by telephone with its customers receiving exchange service within any one of said other ten central office districts, it is necessary for plaintiff to connect by means of conduits and cables the central office equipment installed in any one of said districts with the central office equipment installed in the remaining ten districts; that the central office equipment installed in each [fol. 5] of said central office districts the aggregate investment by plaintiff in which said central office equipment exceeds, as aforesaid, the sum of $10,000,000, is necessarily housed in eleven buildings located at the central wire point in said central office districts, and called central office buildings; that said buildings and the land on which said buildings are located are (with the exception of the Glendale central office) owned by said plaintiff, and all of said buildings, including the Glendale central office building, are situated wholly inside the city limits of Seattle, and the investment of said plaintiff in the land and buildings owned as aforesaid now exceeds, and did exceed in 1931, the sum of $3,000,000.

X

That plaintiff's said customers receiving exchange service within the Seattle Exchange, but receiving such service outside the city limits of Seattle, are furnished exchange service by the use of the central office equipment installed as aforesaid in the aforesaid central office buildings; that

said central office equipment is necessarily connected with the telephone equipment consisting of telephone stations, drop wires, protectors, coin boxes, etc., installed in the places of business or residences of said customers receiving service in the Seattle Exchange but outside the city limits thereof; that the connection between said central office equipment installed as aforesaid in said central office buildings and the telephone equipment installed on the premises of plaintiff's customers receiving exchange service outside the city limits of Seattle, but within the Seattle Exchange, is necessarily made by means of wires strung on poles, or cables strung on poles, or laid in conduits; that said poles, conduits, wires and cables are located partly inside and partly outside the city limits of Seattle.

[fol. 6] XI

That said lands and buildings owned and situated as aforesaid are used and of necessity used in the rendition of plaintiff's telephone exchange service in said Seattle Exchange; that it is impossible for plaintiff to determine or estimate the proportion of the moneys received by it in Seattle in 1931 from its customers receiving exchange service in the Seattle Exchange, whether such customers receive such service inside or outside the city limits of Seattle, due to the use and necessary use by said plaintiff of said lands and the buildings thereon in the rendition of said exchange service.

XII

That said plaintiff was engaged in 1931, not only in rendering telephone exchange service but also telephone toll service; that telephone toll service is divided into two classes, intrastate toll service and interstate toll service; that intrastate toll service is telephone service between telephone stations located in different exchange areas, all of which areas are located within the State of Washington; and interstate toll service is telephone service between telephone stations located in different exchange areas within the State of Washington and telephone stations located in different Exchange areas outside the State of Washington. That in order for plaintiff's customers receiving intrastate toll service inside the city limits of Seattle to communicate with plaintiff's customers receiving intra-

state toll service in areas outside the Seattle Exchange, it was necessary in 1931 and still is necessary for plaintiff to connect its telephone plant located inside the city limits of Seattle, including said central office equipment housed as aforesaid, in said central office buildings, with plaintiff's telephone plants located in exchange areas outside the Seattle Exchange: that in order for plaintiff's customers [fol. 7] receiving telephone service outside the city limits of Seattle, but within the Seattle Exchange area, to communicate with plaintiff's customers receiving intrastate toll service furnished by plaintiff in exchange areas other than the Seattle Exchange, it was necessary in 1931 and still is, for plaintiff to connect not only the telephone plant of plaintiff located inside the city limits of Seattle in which said plaintiff has invested capital of many millions of dollars, but also the telephone plant of plaintiff, including among other items of property, poles, wires, cables, conduits, telephone stations, drop wires, protectors, coin boxes, etc., (but no central office equipment or land or buildings) located outside the city limits of Seattle but within the Seattle Exchange, with the telephone plant of plaintiff located in exchange areas outside the Seattle Exchange area; that said plaintiff had in the year 1931, a capital investment in plant, land and buildings, all of which were located outside the Seattle Exchange but within the State of Washington, and used and necessarily used in the operation of its intrastate telephone toll service, in excess of $20,000,000, and which said plant, land and buildings were necessary to the rendition by plaintiff of intrastate telephone toll service to its customers receiving service within the Seattle Exchange.

XIII

That it is impossible for plaintiff to determine or estimate the proportion of the money received by it in 1931 from its customers in the Seattle Exchange receiving intrastate toll service, whether such customers receive such service inside or outside the city limits of Seattle, due to the use and necessary use by said plaintiff of (a) the lands and the buildings thereon owned and situated inside the city limits of Seattle and (b) the lands and the buildings thereon situated in other exchange areas within the State of Washington, in the rendition of said intrastate toll service.

[fol. 8] XIV

That plaintiff is engaged in rendering intrastate and interstate telegraph service; that it had long prior to 1931, duly filed with the Postmaster General of the United States, its written acceptance of the restrictions and obligations required by the Act of Congress of July 24, 1866 (14 Stat. L. 221); that plaintiff's customers residing in the City of Seattle in 1931 desiring to transmit messages by telegraph to persons residing at points other than Seattle in the State of Washington, tendered to plaintiff, either in person or by telephone, such messages at the aforesaid central office buildings of plaintiff located inside the city limits of Seattle; that said messages were accepted by and transmitted telegraphically by plaintiff; that some of plaintiff's customers residing outside the City of Seattle but within the area of the Seattle Exchange tendered in 1931 by telephone to plaintiff, messages to be transmitted telegraphically by plaintiff to points in the State of Washington other than Seattle, which said messages were accepted by and transmitted telegraphically by plaintiff; that all of said messages, tendered as aforesaid and accepted as aforesaid in the year 1931, were transmitted from the central office buildings of said plaintiff located in the City of Seattle by the use of central office equipment housed in said central office buildings and by the use of poles, wires, cables and conduits extending between said central office buildings located in the City of Seattle to central office buildings owned by plaintiff located in points other than Seattle in the State of Washington, and by the use of central office equipment housed in said buildings located as aforesaid in points other than Seattle in the State of Washington.

XV

That it is impossible for plaintiff to determine or estimate the proportion of the money received by it in 1931 [fol. 9] from its customers employing its intrastate telegraph service, whether such customers employing such service resided inside the city limits of Seattle or outside the city limits of Seattle, but, within the area of the Seattle Exchange, due to the use and necessary use by said plaintiff of (a) the lands and the buildings thereon owned and situated inside the city limits of Seattle and (b) the lands and the buildings thereon situated in points other than

Seattle in the State of Washington, which said last mentioned land and buildings were in 1931 and are now owned by plaintiff.

XVI

That plaintiff's telephone and telegraph business in the City of Seattle is conducted efficiently and economically; that plaintiff's net earnings derived from its telephone and telegraph business in the Seattle Exchange during the first three months of 1932, stated in rate per cent annual return upon the cost of plaintiff's property, used and useful in furnishing said service in said exchange and exclusively devoted to the rendition thereof was not in excess of 3.25%; that plaintiff's net earnings derived from its telephone and telegraph business in the City of Seattle, stated in rate per cent annual return upon the cost of the property located in the City of Seattle and used and useful in furnishing telephone and telegraph service and exclusively devoted to the rendition thereof during the first three months of 1932, was somewhat less than 3.25%; that the net earnings of plaintiff on said property, together with any additions made thereto during the months of April, May, June, July, August and September 1932, are now declining, and based upon past and present experience, will continue to decline throughout the year 1932.

XVII

That the defendants have at all times since the effective date of said ordinance threatened and still threaten to en- [fol. 10] force the same and the penalties thereof against the plaintiff.

XVIII

That the plaintiff has paid all taxes of any and every kind levied either by or for the State of Washington, the County of King, a municipal corporation of the State of Washington or the City of Seattle, against all of its property of any and every kind for the tax years prior to 1931; that on March 15, 1932, the plaintiff paid to the treasurer of King County, the sum of $96,908.41 being the total 1931 tax, less 3% rebate, on the real property owned by the plaintiff in the City of Seattle, and of this amount $44,164.01 was the tax levied for the City of Seattle against the said real property owned by this plaintiff in the City

of Seattle, the remainder of said amount being the tax levied for the State of Washington, for the County of King, a municipal corporation of the State of Washington in which the City of Seattle is located, for Seattle School District No. 1, and for the Port of Seattle, a municipal corporation of the State of Washington; that on March 15, 1932, the plaintiff paid to the treasurer of King County, $302,590.97, being the first half of the 1931 tax levied against all of the plaintiff's personal property located in King County, Washington, $126,664.52 of said amount being the amount of taxes levied for the City of Seattle against the personal property of the plaintiff located inside the city limits of Seattle, the remainder of said amount being the amount of taxes levied for the State of Washington, for the county of King, for Seattle School District No. 1 and various other school districts in said County of King, for the Port of Seattle, a municipal corporation of the State of Washington, and for various towns and road districts in said county located outside the city limits of Seattle; that the remaining one-half of said personal property tax for the year 1931 can be paid without penalty on or before November 30, 1932.

[fol. 11] XIX

That said ordinance No. 62662 is invalid and void:

(1) For the reason that cities of the first class have power only to license, but do not have power to license for revenue.

(2) For the reason that it violates Chapter 227 of the Laws of 1929 of the State of Washington, pursuant to which plaintiff is licensed to engage in the telephone business in and througout the State of Washington, including the City of Seattle.

(3) For the reason that it conflicts with Chapter 107 of the Laws of 1929, and with Chapter 107 of the Laws of 1923 of the State of Washington, pursuant to which plaintiff has paid and still pays a fee of one-tenth of one per cent of its gross operating revenue, exclusive of revenue from interstate transactions, said payment in the year 1932,

being $12,277.11, into the public service revolving fund of the State of Washington.

(4) For the reason that it conflicts with the public service commission law of the State of Washington, being Sections 10339 to 10459 inclusive, of Remington's Compiled Statutes of the State of Washington, and amendments thereto, pursuant to which plaintiff is under the exclusive jurisdiction of the Department of Public Works of the State of Washington as to the conduct and operation of its business, including its rate of return, throughout the State of Washington, including the City of Seattle, and has a continuous duty to serve the public and cannot cease to do its business or any part thereof in the City of Seattle, or elsewhere in the State of Washington, without the consent of the State of Washington.

(5) For the reason that it conflicts with the common law of the State of Washington relating to businesses affected with a public interest, including the business of the plaintiff, in that under said common law plaintiff cannot cease [fol. 12] to do its business or any part thereof in the City of Seattle, or elsewhere in the State of Washington, without the consent of the State of Washington.

(6) For the reason that in view of the premises said City of Seattle has no power to license or refuse to license plaintiff for the conduct of its business within the City of Seattle, and having no power to license at all, has no power to license for revenue.

(7) For the reason that the said tax attempted to be imposed by said ordinance No. 62662, being a tax on gross income, is a direct property tax, and that defendant city has no power, either by statute or constitution, to levy a direct property tax upon only the public utilities and others, including plaintiff, mentioned in said ordinance, in addition to direct property taxes already paid by said utilities and others, including plaintiff, on their real and personal property.

(8) For the reason that said ordinance violates Article I, Section 3 of the Constitution of the State of Washington, in that it deprives plaintiff of property without due process of law, on the following grounds:

(a) That plaintiff is not now and for more than twenty-one months last past has not been earning a fair return upon its property within the City of Seattle used and useful in the public service, and that said tax or any portion thereof, required by said ordinance is arbitrary, unreasonable, oppressive and confiscatory of plaintiff's property.

(b) That said ordinance undertakes completely to prohibit the doing of an entirely lawful business except upon payment of a non-regulatory license fee with respect to a business that said city has no power to regulate.

[fol. 13] (c) That said ordinance is so vague and indefinite in its definition of gross income as to render it impossible for plaintiff thereunder to compute, with reasonable certainty, the amount of the tax, if any, owing by it thereunder, and subjects plaintiff to criminal penalties for noncompliance with the said vague and indefinite terms of said ordinance.

(d) That said ordinance is vague and indefinite, in that it fixes no method of computation whereby plaintiff, with reasonable certainty, can segregate its interstate business from its business conducted wholly within the City of Seattle, nor any method whereby plaintiff can, with reasonable certainty segregate its business conducted wholly within the city of Seattle from its intrastate business conducted between the said City of Seattle and points outside said City in the State of Washington.

(9) For the reason that said ordinance violates Article I, Section 12, of the Constitution of the State of Washington, in that said license fee is arbitrary and discriminatory, because different rates are fixed by said ordinance on businesses (public utilities) in the same general class.

(10) For the reason that said ordinance violates Article VII Section 9, of the Constitution of the State of Washington, in that being a tax on gross revenue, it imposes a direct property tax not uniform in respect to persons and property within the jurisdiction of the body levying the same.

(11) For the reason that said ordinance conflicts with the due process clause of the Fourteenth Amendment to the

Constitution of the United States, on the following grounds:

(a) That plaintiff is not now and for more than twenty-one months last past has not been earning a fair return upon its property within the City of Seattle used and useful in the public service, and that said license fee, or any [fol. 14] portion thereof, required by said ordinance is arbitrary, unreasonable, oppressive and confiscatory of plaintiff's property.

(b) That said ordinance undertakes completely to prohibit the doing of an entirely lawful business except upon payment of a non-regulatory license fee, with respect to a business that said City has no power to regulate.

(c) That said ordinance is so vague and indefinite in its definition of gross income as to render it impossible for plaintiff thereunder to compute, with reasonable certainty, the amount of the tax, if any, owing by it thereunder, and subjects plaintiff to criminal penalties for noncompliance with the said vague and indefinite terms of said ordinance.

(d) That said ordinance is vague and indefinite, in that it fixes no method of computation whereby plaintiff, with reasonable certainty, can segregate its interstate business from its business conducted wholly within the City of Seattle, nor any method whereby plaintiff can, with reasonable certainty, segr-ate its business conducted wholly within the City of Seattle from its intrastate business conducted between the said City of Seattle and points outside said city.

(12) For the reason that said ordinance conflicts with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, in that the license fees fixed by said ordinance are arbitrary and discriminatory because different rates are fixed by said ordinance on businesses (Public utilities) in the same general class.

(13) For the reason that said ordinance conflicts with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, in that the license tax imposed thereunder, being a direct property tax, con-[fol. 15] stitutes an additional property tax on the property of plaintiff and is levied on an unequal and discriminatory

basis on the public utilities included and affected by the ordinance.

XX

That the General Fund of the defendant City of Seattle, is now heavily overdrawn, and that the banks in the said city have since May, 1932, refused to cash or accept any and all warrants on said fund, and that warrants on said fund, cannot be cashed, and that even if said license tax were computable by plaintiff, with reasonable certainty, and plaintiff paid the same, the time of repayment thereof to plaintiff by said city is wholly conjectural and uncertain.

XXI

That plaintiff has no adequate remedy at Law, and that unless equitable relief by injunction, temporary and permanent, is granted by this court, plaintiff will be deprived of its rights as hereinbefore alleged; that the loss resulting from the enforcement of said ordinance is irreparable, and that the penalties provided by said ordinance are so severe and will lead to such a multiplicity of suits and prosecutions that plaintiff has no adequate remedy except in a court of equity.

Wherefore, plaintiff prays the judgment and decree of this court as follows:

1. That the defendants and each of them and their agents servants and employees be temporarily and permanently enjoined and restrained from enforcing as against this plaintiff, the said ordinance No. 62662, or any portion thereof.

2. That the defendants and each of them, be required to show cause on a day certain, to be fixed by this court, why [fol. 16] a temporary injunction should not issue against the defendants, and each of them, and against their agents, servants and employees, from enforcing as against this plaintiff, the said ordinance No. 62662 or any portion thereof.

3. That upon the trial of the merits of this cause a permanent injunction issue against the said defendants, and each of them, and their agents, servants and employees,

from enforcing as against this plaintiff the said ordinance or any portion thereof.

4. That the plaintiff do have and recover its costs and disbursements herein.

5. That plaintiff have such other and further relief as to the court shall seem meet and equitable in the premises.

McMicken, Ramsey, Rupp & Schweppe, Attorneys for Plaintiff.

Duly sworn to by I. F. Dix. Jurat omitted in printing.

[fol. 17] EXHIBIT "A" TO AMENDED COMPLAINT

Ordinance No. 62662 (Council Bill 53240)

An Ordinance Relating to and Providing for a License or Occupation Tax Upon Certain Businesses, Occupations, Pursuits and Privileges, Defining Offenses and Providing Penalties

Be it ordained by the City of Seattle as follows:

Section 1. Exercise of Revenue License Power: The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue.

Section 2. Definitions: In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied;

Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

Person or Persons: Persons of either sex, firms, copartnerships, corporations and other associations of natural persons, whether acting by themselves or by servants, agents or employes.

Taxpayer: Any person liable to the license fee or tax imposed by this ordinance.

Tax Year or Taxable Year: The year commencing March 1st and ending on the last day of February of the following year, or in lieu thereof the taxpayer's fiscal year when per- [fol. 18] mission is obtained from the City Comptroller to the same as the tax period.

Section 3. "Occupation License" Required: After the 1st day of July 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained and being the holder of a valid and subsisting license so to do, to be known as an "Occupation License".

Any person engaging in, or carrying on, more than one such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in, or carries on, any business subject to tax hereunder without having his "Occupation License" so to do, shall be guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

Section 4. License Tax Year: All "Occupation Licenses" shall be for the tax year for which issued and shall expire at the end of such tax year.

Such "Occupation License" and the fee or tax therefor hereby imposed shall be for the year commencing March 1st and ending on the last day of February of the following year; Provided however, that if the taxpayer in transacting his business keeps the books reflecting the same for a fiscal year not based on the calendar year, he may, with the assent of the City Comptroller, obtain his license for the period of his current fiscal year which shall be deemed his tax year, and pay the fee or tax computed upon his gross income made during his fiscal year (next preceding

his tax year) covering his accounting period as shown by the method of keeping the books of the business.

[fol. 19] Section 5. Occupations Subject to Tax-Amount: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income as follows:

(a) Upon every person engaged in or carrying on a telegraph and/or telephone business, a fee or tax equal to four per cent (4%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

(b) Upon every person engaged in or carrying on the business of selling or furnishing gas and/or water for hire, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

(c) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year.

(d) Upon every person conducting or engaged in the business of supplying steam heat or power to the public for hire, a fee or tax equal to four per cent (4%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Fifty ($50.00) Dollars per [fol. 20] tax year.

(e) Upon every person engaged in the business of operating or conducting a fire alarm system, district tele-

graph or burglary and police alarm system for hire, a fee or tax equal to two per cent (2%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Hundred ($100.00) Dollars per tax year.

Section 6. City of Seattle, Subject to Tax: Subdivisions (b) and (c) of Section 5 shall, so far as permitted by law, be applicable to the City of Seattle, except that said City shall not, as a taxpayer, be required to conform to the other provisions of this ordinance.

Section 7. Occupations and Privileges Subject to Tax—Amount: There are hereby levied, and shall be collected, annual license fees or occupation taxes against the persons on account of the business activities or privileges and in the amounts hereinafter fixed, as follows:

(a) Upon every person engaged in or carrying on the business of operating any motor vehicle for the transportation of passengers for hire at rates per trip or based on the distance and/or time employed, and driven by the owner or his representative under the routing or direction of the passenger or person hiring the same, the following tax or fee:

When such vehicle does not stand in or upon any public street, alley or other public place, or upon any place open to the public for the use of vehicles while awaiting employment:

For each such vehicle having a seating capacity of seven (7) persons, or less, Fifteen ($15.00) Dollars per tax year;

For each such vehicle having a seating capacity of eight (8) to ten (10) persons, inclusive, Twenty ($20.00) Dollars per tax year;

[fol. 21] For each such vehicle having a seating capacity of eleven (11) to fifteen (15) persons, inclusive, Thirty-six ($36.00) Dollars per tax year;

For each such vehicle having a seating capacity of sixteen (16) to twenty (20) persons, inclusive, Fifty-four ($54.00) Dollars per tax year;

For each such vehicle having a seating capacity of more than twenty (20) persons, Seventy-two ($72.00) Dollars per tax year.

When such vehicle stands in or upon any public street, alley or other public place, or any place open to the public for the use of vehicles while awaiting employment.

For each such vehicle having a seating capacity of seven (7) persons, or less, Thirty ($30.00) Dollars per tax year;

For each such vehicle having a seating capacity of eight (8) to ten (10) persons, inclusive, Thirty-six ($36.00) Dollars per tax year;

For each such vehicle having a seating capacity of eleven (11) to fifteen (15) persons, inclusive, forty ($40.00) Dollars per tax year;

For each such vehicle having a seating capacity of sixteen (16) to twenty (20) persons, inclusive, Fifty-four ($54.00) Dollars per tax year;

For each such vehicle having a seating capacity of more than twenty (20) persons, inclusive, Seventy-two ($72.00) Dollars per tax year.

In determining the seating capacity of any such vehicle the driver and conductor shall be included.

(b) Upon every person engaged in or carrying on the business of operating any motor vehicle over the public streets for the purpose of sight-seeing or showing points of interest, and not elsewhere herein mentioned and licensed, a fee or tax in the same amount as required for the business of operating the vehicles mentioned in Sub-[fol. 22] Section (a) of this section, provided, however, that the vehicles mentioned in this sub-section may be operated by the licensee at rates based on time employed, whether for sight-seeing purposes or not (known as "for hire" service) without securing in addition the license required by said Sub-Section (a).

In determining the seating capacity of any such sight-seeing vehicle the driver and announcer shall be included.

(c) Upon every person engaged in or carrying on the business of operating any motor vehicle over the public streets for the transportation of passengers for hire between common carrier passenger terminals or depots and hotels, and not elsewhere herein mentioned and licensed, for each vehicle Sixty ($60.00) Dollars per tax year.

(d) Upon every person engaged in or carrying on the business of letting the use of any motor vehicle at rates per trip, or based on distance travelled, or time employed and to be driven and routed or directed by the person or persons hiring or renting the same, the following tax or fee:

For each such vehicle which does not stand in or upon any public street, alley or other public place, or any place open to the public for the use of vehicles while awaiting employment, Fifteen ($15.00) Dollars per tax year;

For each such vehicle standing in or upon any public street, alley or other public place, or any place open to the use of the public for vehicles while awaiting employment, Thirty ($30.00) Dollars per tax year.

(e) Upon every person engaged in or carrying on the business of operating any vehicle drawn by or attached to any motor driven and used for the transportation of baggage, express, freight, household goods, merchandise or materials for hire, and which vehicle receives or discharges baggage, express, freight, household goods, merchandise, [fol. 23] or other materials at points within or without the City, and which does not operate over a defined route:

For each such vehicle of not more than								1	tons	capacity,	$3.00	per	tax	year.
"	"	"	"	"	"	"	"	2	"	"	6.00	"	"	"
"	"	"	"	"	"	"	"	3	"	"	9.00	"	"	"
"	"	"	"	"	"	"	"	4	"	"	12.00	"	"	"
"	"	"	"	"	"	"	"	5	"	"	15.00	"	"	"
"	"	"	"	"	"	"	"	6	"	"	18.00	"	"	"
"	"	"	"	more than				6	"	"	21.00	"	"	"

No license required by this ordinance for the operation of any vehicle shall be issued unless the licenses and/or permits therefor required by law or ordinances other than this have been granted.

Section 8. Tax Apportioned for Year 1932: For the remainder of the tax year 1932, ending on the last day of February, 1933, the fees or taxes herein imposed shall be apportioned in the ratio of said remainder to a full tax year.

Section 9. Exceptions and Deductions: There shall be excepted and deducted from the total gross income upon which the license fee or tax is computed so much thereof as is derived from transactions in interstate or foreign commerce, or from business done for the government of the

United States, its officers or agents, and any amount paid by the taxpayer to the United States, the State of Washington, or the City of Seattle, as excise taxes levied or imposed upon the sale or distribution of property or services.

Nothing in this ordinance shall be construed as requiring a license, or the payment of a license fee or tax, or the doing of any act, which would constitute an unlawful burden or interference in violation of the Constitution or laws of the United States, or which would not be consistent with the Constitution or laws of the State of Washington.

Any person subject to the payment of a license fee or tax under the provisions of any ordinance of the City, other than this, on account of engaging in any activity for which [fol. 24] he is liable to tax hereunder, may deduct the amount of such fee or tax from the amount of fee or tax imposed by this ordinance on account of such activity, but such person shall nevertheless, in the manner herein provided for, apply for and procure an "Occupation License."

Section 10. Application or Return for License: On or before the 1st day of July, 1932, and thereafter on or before the first day of each tax year, every taxpayer shall apply to the City Comptroller for an "Occupation License" upon blanks or forms of return to be prepared and provided by him requesting such information as may be necessary to enable him to arrive at the lawful amount of the fee or tax. The taxpayer shall, in a legible manner, write in such blank or form of return the information required and shall sign the same and by affidavit at the foot thereof shall swear or affirm that the information therein given is full and true and that he knows the same to be so.

Every such application or return shall be accompanied by a remittance by bank draft, certified check, cashier's check, or money order, payable to the City Treasurer, or in cash, in the amount of the tax or fee or installment thereof required by the provisions hereof.

If the applicant be a partnership, the application or return must be made by one of the partners; if a corporation, by one of the officers thereof; if a foreign corporation, co-partnership or non-resident individual, by the resident agent or local manager of sad corporation, co-partnership or individual.

Section 11. Monthly and Quarterly Payment of Tax: Where the amount of the license fee or tax is based upon gross income, the taxpayer may pay his fee or tax in equal monthly installments during the life of his license, each such installment to be paid on or before the 10th day of the month. In all other cases the taxpayer may pay his fee or tax in equal installments during the life of his license, each such installment to be paid on or before the 1st day of March, the 1st day of June, the 1st day of September, and [fol. 25] the 1st day of December, respectively.

Section 12. When Tax Based on Current Year—Commencement of Business During Tax Year: Where a business, occupation or pursuit subject to tax upon gross income has not been carried on for the full calendar or fiscal year next preceding the tax year for which license is required, the license fee or tax shall be paid monthly in installments during the life of the license on or before the 10th day of the month, and shall be based upon the gross income for the month next preceding that in which payment is due. In such cases the taxpayer shall make monthly returns similar to the annual returns provided for herein on or before the 10th day of the month, under oath or affirmation covering the business of the previous month.

In all other cases where a person commences during any tax year to engage in any business, occupation, pursuit or privilege, he shall be entitled to a license for the remainder of such tax year for the required fee apportioned in the ratio of said remainder to a full tax year.

Section 13. Monthly Payments—License Prerequisites: In any case where the taxpayer pays his license fee or tax monthly he shall nevertheless first procure his "Occupation License" in the manner herein required before commencing or continuing in business, and shall pay the minimum fee or tax therefor, which shall be credited against future installments.

Section 14. Sale or Transfer of Business: Upon the sale or transfer during any tax year of a business on account of which a fee or tax is hereby required, the purchaser or transferee shall, if the fee or tax has not been paid in full for said year, be responsible for its payment for that portion of said year during which he carries on such business.

Section 15. Taxpayer to Keep Books and Records—Returns Confidential: It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper [fol. 26] book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the City Comptroller, pursuant to this ordinance, shall not be made public, nor shall they be subject to the inspection of any person except the Mayor, the Corporation Counsel, the City Comptroller, or his authorized agent, and members of the City Council.

Section 16. Comptroller to Investigate Returns: If any taxpayer fails to apply for license or make his return, or if the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements, as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place for an investigation of the correctness of the return and may issue a subpœna to the taxpayer, or any other person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpœna, require him, or any person, to bring with him such books, records and papers as may be necessary.

Section 17. Over or Underpayment of Tax: If the City Comptroller upon investigation or upon checking returns finds that the fee or tax paid or any of them is more than the amount required of the taxpayer, he shall refund the amount overpaid by a warrant upon the General Fund. If the City Comptroller finds that the fee or tax paid is [fol. 27] less than required, he shall send a statement to

the taxpayer showing the balance due, who shall, within three (3) days pay the amount shown thereon.

Section 18. Remedy for Non-payment of Tax: If any taxpayer fails to apply for license, or make his return, or to pay the fee or tax therefor, or any part thereof, within three (3) days after the same shall have become due, the City Comptroller shall ascertain the amount of the fee or tax or installment thereof due and shall notify such taxpayer thereof, who shall be liable therefor to any suit or action by the City for the collection thereof. The City Comptroller shall also notify the Corporation Counsel in writing of the name of such delinquent taxpayer and the amount due from him and said officer shall, with the assistance of the City Comptroller, collect the same by any appropriate means or by suit or action in the name of the City.

Section 19. Appeals to City Council: Any taxpayer aggrieved by the amount of the fee or tax found by the City Comptroller to be required under the provisions of this ordinance, may appeal to the City Council from such finding by filing a written notice of appeal with the City Clerk within five (5) days from the time such taxpayer was given notice of such amount. The Clerk shall, as soon as practicable, fix a time and place for the hearing of such appeal, which time shall be not more than ten (10) days after the filing of the notice of appeal, and he shall cause a notice of the time and place thereof to be delivered or mailed to the appellant. At such hearing, the taxpayer shall be entitled to be heard and to introduce evidence in his own behalf. The City Council shall thereupon ascertain the correct amount of the fee or tax by resolution and the City Clerk shall immediately notify the appellant thereof, which amount, together with costs of the appeal, if appellant is unsuccessful therein, must be paid within three (3) days after such notice is given.

[fol. 28] The President of the City Council, or the Chairman of any committee thereof before which the appeal is to be heard, may, by subpœna, require the attendance thereat of any person, and may also require him to produce any pertinent books and records. Any person served with such subpœna shall appear at the time and place therein stated and produce the books and records required, if any, and shall testify truthfully under oath administered

by the Chairman in charge of the hearing on appeal as to any matter required of him pertinent to the appeal, and it shall be unlawful for him to fail or refuse so to do.

Section 20. Comptroller to Make Rules: The City Comptroller shall have the power, and it shall be his duty, from time to time, to adopt, publish and enforce rules and regulations not inconsistent with this ordinance or with law for the purpose of carrying out the provisions thereof, and it shall be unlawful, to violate or fail to comply with, any such rule or regulation.

Section 21. Licenses—Posting—Unlawful Use of: All licenses issued pursuant to the provisions of this ordinance shall be kept posted by the licensees in a conspicuous place in his principal place of business in the City, except that all licenses for the operation of a vehicle shall be attached in a conspicuous place upon the right hand side of such vehicle in a suitable holder to be furnished by the City Comptroller upon the payment of a fee of Twenty-five ($.25) cents.

No person to whom a license has been issued, pursuant to this ordinance, shall suffer or allow any other person chargeable with a separate license to operate under or display his license, nor shall such other person operate under or display such license.

Section 22. False Returns, etc.: It shall be unlawful for any person liable to tax hereunder to fail or refuse to make application or return for a license or to pay the fee or tax or installment thereof when due, or for any person to make [fol. 29] any false or fraudlent application or return or any false statement or representation in, or in connection with, any such application or return, or to aid or abet another in any attempt to evade payment of the fee or tax, or any part thereof, or for any person to fail to appear and/or testify in response to subpœna issued pursuant hereto, or to testify falsely upon any investigation of the correctness of a return, or upon the hearing of any appeal, or in any manner to hinder or delay the City, or any of its officers in carrying out the provisions of this ordinance.

Section 23. Effect of Partial Invalidity: If any provision or section of this ordinance shall be held void or unconstitutional, all other parts, provisions and sections of this

ordinance not expressly so held to be void or unconstitutional shall continue in full force and effect.

Section 24. Penalty: Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the City Jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 25. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed the City Council 23 day of May, 1932, and signed by me in open session in authentication of its passage this 23 day of May, 1932.

James Scavatto, President pro Tem. of the City Council.

[fol. 30] Approved by me this 25 day of May, 1932.

Philip Tindall, Acting Mayor.

Filed by me this 25 day of May, 1932.

Attest:

H. W. Carroll, City Comptroller and ex-Officio City Clerk, by E. M. Street, Deputy Clerk. (Seal.)

Published May 31, 1932.

H. W. Carroll, City Comptroller and ex-Officio City Clerk, by E. M. Street, Deputy Clerk.

[fol. 31] In Superior Court of King County

[Title omitted]

Demurrer to Amended Complaint—Filed Oct. 18, 1932

Come now the defendants and demur to the amended complaint of plaintiff herein on the ground and for the rea-

son that the same does not state facts sufficient to constitute a cause of action, either at law or in equity.

A. C. Van Soelen, Corporation Counsel; Walter L. Baumgartner, Assistant, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 32] IN SUPERIOR COURT OF KING COUNTY

No. 254,908

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corporation, and Harry W. Carroll, as Comptroller of the City of Seattle, Defendants

JUDGMENT AND DECREE OF DISMISSAL—Filed Oct. 18, 1932

This cause coming on for hearing before the Honorable J. T. Ronald, one of the judges of the above entitled Court, on this 18th day of October, 1932, plaintiff appearing by McMicken, Ramsey, Rupp & Schweppe, its attorneys, and defendants appearing by A. C. Van Soelen, Corporation Counsel, and Walter L. Baumgartner, Assistant Corporation Counsel, and the Court having entered an order on this date sustaining the demurrer of the defendants to plaintiff's amended complaint herein, to which order plaintiff duly excepted, thereupon said plaintiff by its said counsel gave notice in open Court that it elects to stand upon the said amended complaint and declines to plead further;

Wherefore, by reason of the law and the premises, it is by the Court considered, ordered and decreed that plaintiff's cause of action be and the same is hereby dismissed, and that defendants go hence without day, and that defendants recover of plaintiff their costs and disbursements herein.

At the time of the signing of this judgment plaintiff duly excepted to the same, and said exception is hereby allowed.

Done in open Court this 18th day of October, 1932.

J. T. Ronald, Judge.

[fol. 33] Presented by Otto B. Rupp.

IN SUPERIOR COURT OF KING COUNTY

ORDER ALLOWING APPEAL

At the time the above and foregoing judgment and decree are entered and made, the above named plaintiff in said cause, by its said attorneys, gives notice in open court that it appeals from said judgment and decree, and from each and every ruling of the Court adverse to plaintiff, to the Supreme Court of the State of Washington, and said appeal is hereby allowed, and the Clerk of this Court is directed to make an entry of said notice of appeal in the journal of the Court.

Done in open Court this 18th day of October, 1932.

J. T. Ronald, Judge.

Presented by Otto B. Rupp.

Entered in Execution Docket, vol. 109, page 311.
Judgment No. 118,633.

[File endorsement omitted.]

[fols. 34 & 35] Bond on appeal for $200.00, approved and filed Oct. 19, 1932, omitted in printing.

[fol. 36] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 37]. IN SUPREME COURT OF WASHINGTON

En Banc

No. 24327

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant,

v.

THE CITY OF SEATTLE, a Municipal Corporation, and Harry W. Carroll, as Comptroller of the City of Seattle, Respondents

OPINION—Filed April 21, 1933

The plaintiff brought this action to enjoin the defendant from collecting a license tax under ordinance No. 62,662, being entitled:

"An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties."

A demurrer interposed to the amended complaint was sustained. The plaintiff, electing to stand on the pleading, appeals from a judgment dismissing the action and assigns error as follows:

"I. The court erred in sustaining respondents' demurrer to appellant's amended complaint.

"II. The court erred in dismissing appellant's cause of action.

"III. The court erred in failing to hold that the enforcement of the ordinance as to appellant would contravene the Fourteenth Amendment to the Constitution of the United States, and article I, § 3, and article VII, § 9, of the constitution of the state of Washington."

The pertinent provisions of the ordinance are:

"Section 1. Exercise of Revenue License Power: The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue."

"Section 2. * * * Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness or stocks and the like) and without any deduction on [fol. 38] account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

"Section 5. Occupations Subject to Tax-Amount: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income as follows:

"(a) Upon every person engaged in or carrying on a telegraph and/or telephone business, a fee or tax equal to four per cent (4%) of the total gross income from such business in the city during his fiscal year next preceding the tax year for which the license is required; provided however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year."

The appellant sets up some twenty-one separate grounds or reasons why the tax sought to be collected from it under the ordinance is invalid. For the purposes of this discussion, these may be classified into five groups: (1) That the city has no power to levy such a tax; (2) that the state has preempted this field of taxation; (3) that the definition of "Gross Income" is so indefinite and uncertain that neither the income subject to the tax nor the amount thereof can be ascertained; (4) that the tax is unreasonable, oppressive and confiscatory; and (5) that the tax is in contravention of appellant's rights under the Act of Congress of July 24, 1866, known as the Post Roads Act.

I. It is first contended that there is no grant of power from the state to the city to levy such a tax. The power, under which the right to levy the tax is asserted, is found in Rem. Comp. Stat., §§ 8966 and 8981.

Section 8966 relates to the powers of cities of the first class, and, among other things, provides:

"Any such city shall have power—

* * * * * * *

"33. To grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefor, and to provide for revoking the same: Provided, that no license shall be granted to continue for longer than one year from the date thereof; * * *"

Section 8981 provides:

[fol. 39] "Any city adopting a charter under the provisions of this act shall have all the powers which are now or may hereafter be conferred upon incorporated towns and cities by the laws of this state, and all such powers as are usually exercised by municipal corporations of like character and degree, whether the same shall be specifically enumerated in this act or not."

This court has held in numerous cases that cities and towns, under the powers granted, have the right to impose license taxes either for the purpose of regulation or revenue. Fleetwood v. Read, 21 Wash, 547, 58 Pac. 665, 47 L. R. A. 205; Walla Walla v. Ferdon, 21 Wash. 308, 57 Pac. 796; Stull v. DeMattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; In re Garfinkle, 37 Wash. 650, 80 Pac. 188; Town of Sumner v. Ward, 126 Wash. 75, 217 Pac. 502; Town of Bucoda v. Swaney, 163 Wash. 43, 299 Pac. 652.

Speaking of the grant of power contained in subdivision 33, § 8966, supra, in the Fleetwood case, Judge Dunbar said:

"This provision is in relation to cities of the first class. * * * The language is comprehensive. The authority is to grant licenses for any lawful purpose, and, in the absence of restriction, the purpose of raising revenue is as lawful as the purpose of exercising the police power. This interpretation is borne out, we think, by the authorization of the legislature to cities of other classes. * * * And so the power to license for purposes of revenue is especially granted to all the other classes of cities."

We think that, by virtue of § 8981, supra, the power to license for purposes of revenue is also "especially granted"

to cities of the first class. In any event, subdivision 33 of § 8966 has been uniformly construed to confer such power. Pacific Tel. & Tel. Co. v. Everett, 97 Wash. 259, 166 Pac. 650.

II. It is contended that, conceding the power, the city is precluded from exercising it, because the state has pre-empted this field of taxation. With respect to police powers, it is a rule of universal application that a municipality may not enact regulatory ordinances upon subjects covered by state legislation. State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861; Seattle Electric Co. v. Seattle, 78 Wash. 203, 138 Pac. 892. Whether this rule is applicable [fol. 40] in cases involving the exercise of the taxing power, it is not necessary for us to determine, because the state had not entered this field of taxation at the time the ordinance in question was enacted.

It must be kept in mind that the power granted to the city to issue licenses is dual: (1) for regulation; (2) for revenue. The power here exercised is for revenue and not for regulation. Here the granting of the license is an incident to the power to raise revenues. The license is the means, not the end. It is the method provided for raising the revenues. The penalty provided is merely a mode of enforcing payment, and the license is only a receipt for the tax. Home Insurance Co. v. City Council, 93 U. S. 116. The tax is an excise. It is levied upon the right to do business, not upon the right to exist; nor upon the property. The cases relied upon by appellant on this point so characterize such a tax. State ex rel. Zielonka v. Carrel, 124 N. E. 134; Cincinnati v. American Telephone & Telegraph Co., 147 N. E. 806; Firestone v. Cambridge, 148 N. E. 471.

In I Cooley on Taxation (4th ed.), § 26, it is said:

"One distinction between a tax upon a business * * * and a license is said to be 'that the former is exacted by reason of the fact that the business is carried on * * * within the jurisdiction of the taxing power, and the latter is required as a condition precedent to the right to carry on such business * * * within the jurisdiction.' So it has been said that a charge cannot be deemed a license rather than a tax unless the payment thereof confers some right or privilege upon the person charged which otherwise would not exist."

A license is granted under the police power; an excise is imposed under the taxing power. The former is essentially not a tax at all. I Cooley, Taxation (4th ed.), § 26.

"The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, although the purpose is essentially different. The one is made for regulation and the other for revenue. If for regulation, it is an exercise of the police power while if for revenue it is an exercise of the taxing power." I Cooley, Taxation (4th ed.), § 27.

[fol. 41] Bearing this distinction in mind, we shall examine briefly the statutes, by virtue of which appellant contends that the state has preempted the field of taxation covered by the ordinance.

Laws of 1929, chapter 107, requires public utility companies, subject to regulation as to rates and charges by the department of public works, to "pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue. * * *" This act is amendatory of § 1 of chapter 107 of the Laws of 1923, which in turn was amendatory of §§ 1 and 3 of chapter 113 of the Laws of 1921. The earlier laws fixed flat rates, determined by gross earnings, ranging from five dollars to $1,500.

Laws of 1921, chapter 113, § 1, refers to persons and corporations required to file statements with the director of public works under § 78, chapter 117, Laws of 1911, and requires them to pay "*a fee*" in accordance with a fixed schedule. Section 2, chapter 113, Laws of 1921, then provides:

"All sums collected by the director of public works under the provisions of this act shall within thirty days after their receipt be paid to the state treasurer, and by him deposited in a *fund to be known as the public service revolving fund.*"

Chapter 117, Laws of 1911, is the public service commission law, and is purely a regulatory act. State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861; Seattle Electric Co. v. Seattle, 78 Wash. 203, 138 Pac. 892. Obviously, chapter 107, Laws of 1929, chapter 107, Laws of 1923, and chapter 113, Laws of 1921, are adjuncts to that act. It is equally obvious, from the words which we have

italicized in § 2 of the latter act, that the fund created was solely for the purpose of defraying the expense attendant to the administration of the public service commission law. We think it is clear, from the entire context of the act of 1921, that the purpose of it was regulatory. The raising of the rates in the act of 1923 and the changing of the [fol. 42] method of computation of the fee to be paid in the act of 1929 have not changed its character.

It is further contended that by chapter 227, Laws of 1929, the state has preempted this field of taxation. That act is entitled, "An Act relating to fees of foreign and domestic corporations * * *;" and the tax exacted has been held to be a license fee to which corporations are subjected for the privilege of doing business in this state in a corporate capacity—as a corporate entity. In Spokane International Ry. Co. v. State, 162 Wash. 395, 299 Pac. 362, construing this act, it is said:

"The tax is upon the privilege the state grants to the corporation to engage in commerce with the advantages derived from a corporate organization, not upon the commerce itself."

III. That "Gross Income" is a proper basis for determining the amount of the tax to be paid, is well established by the authorities. I Cooley, Taxation (4th ed.), § 42; State v. Minnesota & International R. Co., 118 N. W. 679; State v. Central Trust Co., 67 Atl. 267; People ex rel. Westchester Lighting Co v. Gaus, 92 N. E. 230; State v. United Electric Light & Water Co., 97 Atl. 857; Nebraska Telephone Co. v. Lincoln, 117 N. W. 284. The definition of "Gross Income," contained in the ordinance, is substantially the same as that contained in the act of West Virginia, considered in the case of Hope Natural Gas Co. v. Hall, State Tax Commissioner, 274 U. S. 284. The tax challenged in that case was sustained. It would be practically impossible to define "Gross Income" so that more or less pertinent objections could not be aimed at the definition. We are satisfied, however, that the objections raised by appellant are more fancied than real; and that, in practical application, under present day systems of accounting, appellant will have no serious difficulty in ascertaining the amount of tax it is required to pay. The task of segregating revenues derived without the city from those

[fol. 43] derived within, affords no legal objection to the tax. Western Union Tel. Co. v. Fremont, 58 N. W. 415; Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692.

IV. It is next contended that the tax is unreasonable, oppressive and confiscatory. "The power to tax carries with it the power to destroy," has been so frequently stated that it has become axiomatic. Yet, practically, the power to tax is limited to what is reasonable. Oppressive or confiscatory taxes ordinarily will not be sustained. But whether a tax is reasonable is primarily a legislative problem, and the courts will not hold a tax invalid on the ground that it is oppressive or confiscatory unless there is clear abuse of the power conferred. It is said in IV Cooley, Taxation (4th ed.), § 1714:

"Where an excise tax is imposed for revenue, as distinguished from a fee imposed merely for regulation, the extent of the tax, when not limited by the grant itself, must be understood to be left to the judgment and discretion of the municipal government, to be determined in the usual mode in which its legislative authority is exercised; but the grant of authority to impose fees for the purposes of revenue does not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose, where the business or occupation is a useful and lawful one, although there is some authority apparently to the contrary which would preclude a court from considering the amount of the tax in any case. So far as the right to engage in a business of a harmless and useful character is concerned, 'the state may not impose an occupation tax which shall operate as a prohibition or as a burden of magnitude sufficient to render the right valueless.' But a tax for revenue possibly may be made so large as to be prohibitive, where the occupation may be prohibited, although in such a case the fee ordinarily is deemed an exercise of the police power rather than of the taxing power."

This rule has been stated by this court. Stull v. De Mattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; In re Garfinkle, 37 Wash. 650, 80 Pac. 188.

In Nebraska Telephone Co. v. Lincoln, 117 N. W. 284, a levy of two per cent of gross earnings was upheld. A tax of five per cent was sustained in Lincoln Traction Co.

v. Lincoln, 121 N. W. 435. In City of St. Louis v. United Rys. Co., 174 S. W. 78, a tax was levied, and upheld, on [fol. 44] each car used for transporting passengers, at the rate of one mill for every passenger carried. A tax of two per cent on gross receipts was upheld in Southwestern Oil Co. v. State of Texas, 217 U. S. 114. In that case, quoting from Delaware Railroad Tax Cases, 18 Wall. 206, the court said:

"* * * 'it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.'"

We do not think the rate fixed by the ordinance is unreasonable, oppressive or confiscatory.

V. Appellant next contends that, under the act of Congress of July 24, 1866 (14 Statutes L. 221), it has the right to occupy the streets without the city's consent. Conceding this right, it does not impair the city's power to levy taxes on the beneficiaries of the act. In Williams v. Talladega, 226 U. S. 404, it is said:

"These cases, taken together, establish the proposition that the privilege given under the terms of the act to use the military and post roads of the United States for the poles and wires of the company is to be regarded as permissive in character and not as creating corporate rights and privileges to carry on the business of telegraphy, which were derived from the laws of the State incorporating the company, and that this permissive grant did not prevent the State from taxing the real or personal property belonging to the company within its borders or from imposing a license tax upon the right to do a local business within the State."

The demurrer to the amended complaint was properly sustained, and the judgment is affirmed.

Blake, J. Main, J.

We concur.

Beals, C. J. Holcomb, J. Millard, J. Mitchell, J. Tolman, J., took no part.

[fol. 45] IN SUPREME COURT OF WASHINGTON

No. 24327

DISSENTING OPINION

STEINERT, J., dissenting:

I can not agree with either the reasoning or the result of the majority opinion. It is to be borne in mind that the case is before us on the amended complaint, a demurrer thereto which was sustained, and a judgment dismissing the action.

The amended complaint is too long to be set forth in its entirety; a brief summary of it must suffice. Its allegations may be reduced to the following statement: Appellant is a California corporation and as such has complied with the laws of this state relating to foreign corporations. It owns and operates a telephone and telegraph system and does both an intrastate and interstate business. For the sake of convenience and adequate service to its patrons, it has divided the state of Washington into a number of exchange areas. The "Seattle exchange area" includes several thousand telephones outside the limits of the city of Seattle. Service between telephones within the same exchange area is designated "telephone exchange service"; the service between telephones located in different exchange areas is designated "telephone toll service". The company's accounts are kept in accordance with forms prescribed by the Interstate Commerce Commission and the Department of Public Works of Washington. The company has a central office equipment in Seattle having a value in excess of ten million dollars. Through its central office is rendered not only exchange service within the Seattle exchange, but also toll service, both intra-state and interstate. The company also has central office equipments in the other exchange areas throughout the state, aggregating in value about twenty million dollars. The company's business in the city of Seattle, according to the amended complaint, has at all times been conducted in an efficient [fol. 46] and economical manner. Its net earnings derived from its business in the Seattle exchange during the first three months of 1932, stated in rate per cent annual return upon the cost of its property used and useful in fur-

nishing service within the exchange, were not in excess of 3.25%; its net earnings from business wholly within the city's limits were somewhat less. Subsequent to the first three months of 1932, the net earnings declined, and conditions existing at the time that the action was commenced indicate a probable further decline. The company has paid all its taxes for the years prior to 1931. In 1932 it paid taxes, for 1931, on its real estate inside the city, in the sum of $96,908.41, of which the city received $44,164.01 as its proportion. The company also paid $302,590.97 as the first half of 1931 personal property taxes, of which the city received $126,664.52. The remaining half became payable after this action had been commenced.

It is alleged in the amended complaint that the company was licensed by the state of Washington to engage in the telephone and telegraph business in and throughout the state, including the city of Seattle, for which license it paid the state, in 1932, a fee of $12,777.11; that the duty to give telephone service in Seattle and elsewhere in the state is a continuous one and can not be terminated except with the consent of the state; and that for more than twenty-one months last past the company has not earned a fair return upon its property, and that the tax is arbitrary, unreasonable and confiscatory. The demurrer, of course, admits these allegations.

My first reason for dissent is that under the allegations of the amended complaint a prima facie case is stated. Not only is it directly alleged that the license fee is arbitrary, unreasonable and confiscatory, but sufficient facts to support the allegation, if it be considered as a mere conclusion, are also stated. We can not disregard those facts or the issue tendered thereby. If the city can fix the rate [fol. 47] at four per cent, it can also fix it at ten. It is as easy to specify the one as it is the other. There is no innate virtue in the figure four, nor any inherent vice in the figure ten. We can not say, nor are we privileged to say, dogmatically, that a fee of four per cent, as prescribed by the ordinance, is not unreasonable or confiscatory, or that a fee of ten per cent would be. It will require evidence, probably of an expert nature, to show what the actual situation is, and, until that evidence is produced, we can not prejudge it. The demurrer should have been overruled for this reason alone, if for no other.

But I go further. The ordinance is not regulatory, but simply one for revenue. Not only does the ordinance declare it to be a revenue measure, but its very terms make no provision for regulation. This much is conceded in the majority opinion. The question then presents itself: Has the city the right to compel the company to obtain a license from it and to pay a tax or fee therefor before it can continue to carry on its business within the city?

Section 3 of the ordinance provides that after July 1, 1932, no person may engage in any business, occupation, pursuit or privilege for which a license fee or tax is imposed, without a license; that any taxpayer who carries on his business without such license shall be guilty of a violation of the ordinance for each day that the business is carried on or conducted. Section 24 provides that any person failing to comply with any of the provisions of the ordinance shall be guilty of a misdemeanor, punishable by a fine in any sum not to exceed three hundred dollars or by imprisonment in the city jail for a term not exceeding ninety days, or by both such fine and imprisonment.

If the city can not compel the taking out of a license, then it can not impose the tax. In the case before us the company had, under chapter 227, Laws of 1929, § 5, Rem. [fol. 48] Rev. Stat., § 3836-5, paid the state the sum of over twelve thousand dollars for the privilege of doing business in the state of Washington, for the year 1932. The privilege so obtained was comprehensive and subject to no limitations. The city could not give the company something that it already had; nor, conversely, could it take away or withhold a right that the company then possessed. The sovereign having granted the right, the city could not withdraw it. Since it could not take it away, it can not hamper its exercise in the manner attempted. Mayor and Aldermen of Savannah v. Georgia, 36 Ga. 460; Reser v. Umatilla County, 48 Ore. 326, 86 Pac. 595; Cooley on Taxation, 4th Ed., § 1691. A license is simply the authority to conduct a business or pursue a calling, or the right conferred by the municipality which makes the pursuit lawful and without which it would be unlawful. The appellant having been authorized by the state to conduct its business within the state, the city can not make that pursuit unlawful.

The majority opinion cites the following cases in support of the rule that cities and towns may impose taxes either for revenue or regulation: Fleetwood v. Read, 21 Wash. 547, 58 Pac. 665; Walla Walla v. Ferdon, 21 Wash. 308, 57 Pac. 796; Stull v. DeMattos, 23 Wash. 71, 62 Pac. 451; In re Garfinkle, 37 Wash. 650, 80 Pac. 188; Town of Sumner v. Ward, 126 Wash. 75, 217 Pac. 502; Town of Bucoda v. Swaney, 163 Wash. 43, 299 Pac. 652. Those cases do announce that rule, it is true, but neither they nor the rule therein announced are applicable here, for the reason that in none of those instances had the state previously granted the privilege. Consequently, the municipality there had the right to exact a license for the conduct of the business, and the payment of a tax therefor. If the parties did not care to engage in business on the terms exacted, they could either have refrained from entering [fol. 49], upon it or else withdrawn if they had already begun. The situation here is not at all comparable. The company can not withdraw from the field but must continue to function; that was one of the considerations for which it was permitted to enter the state.

Approaching the matter from a somewhat different angle, I am of the view that the particular field of taxation had already been preempted by the state under chapter 113, Laws of 1921, Rem. Comp. Stat., § 10417, chapter 107, Laws of 1923, Rem. 1927 Sup., § 10417, both amended by chapter 107, Laws of 1929, Rem. Rev. Stat., §§ 10417-10419; and chapter 227, Laws of 1929, § 5, Rem. Rev. Stat. § 3836-5. The amending act of 1929 requires every public utility to file with the Department of Public Works an annual statement showing its gross operating revenues for the preceding year, and to pay a fee of one-tenth of one per cent thereon. All such fees are required to be deposited in the public service revolving fund. The act makes the failure to pay such fees a misdemeanor punishable by a fine for each day's failure to pay. The last act requires all foreign corporations doing intra-state business in this state to pay certain fees for the privilege of doing such business. Those acts are, in my opinion, purely license acts and not regulatory. The funds derived therefrom are not devoted to the purpose of regulation, but, with the exception of the annual fees paid to the secretary of state, are required to be paid into the public service revolving fund, which is a general

fund of the state subject to reappropriation by the legislature. The right to appropriate funds, under Art. VIII, § 4, of the state Constitution, is recognized in State ex rel Bloedel-Donovan Lumber Mills v. Clausen, 122 Wash. 531; 211 Pac. 281, and State ex rel. Shuff v. Clausen, 131 Wash. 119, 229 Pac. 5. The state having occupied the field of excise taxation, the city may not encroach upon it. We have here the same situation, in principle, as was presented in State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861, where the right of the state was declared [fol. 50] supreme and exclusive. The state having granted the privilege and having taxed it, the city could not thereafter exact an additional sum for the same privilege or right; otherwise, the municipality, by added exactions, could thwart the whole purpose of the state in admitting corporations to do a specific business therein on such terms as it saw fit to fix. The sovereign would be subsidiary to its various subdivisions. Cincinnati v. American Telephone & Telegraph Co., 112 Ohio St., 493, 147 N. E. 806; Firestone v. City of Cambridge, 113 Ohio St., 57, 148 N. E. 470; Cincinnati Oil Works v. City of Cincinnati, 123 Ohio St. 448, 177 N. E. 768.

Further, I think that the definition of "Gross Income", in the ordinance, is so vague and uncertain as to render the ordinance inoperative and void. By its provisions the ordinance is penal. Fine and imprisonment are the penalties for non-compliance. The taxpayer is entitled to know definitely and certainly the amount of tax which he is required to pay and the method of its ascertainment, without the expense of litigation necessary to determine either. Western Union Telegraph Co. v. Texas, 62 Tex. 630; State ex rel Crow, Attorney General, v. West Side Street Ry. Co., 146 Mo. 155, 47 S. W. 959; Standard Oil Co. v. State, 178 Ala. 400, 59 So. 667; Winslett v. Case-Fowler Lumber Co., 173 Ga. 539, 160 S. E. 384.

Looking at the terms of the ordinance, I do not see how the taxpayer could possibly determine the amount of tax to be paid by it, or the method of its ascertainment, without resort to litigation. Different and vitally conflicting views will arise out of the interpretation of its language. Section 2 of the ordinance reads as follows, with reference to the definition of income:

"Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other [fol. 51] emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages or other evidences of indebtedness or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

Does the word "value" as there used import "cost price", "sale price", or "net profit" on the sale of tangible property or service? If any one of these was intended, it could easily have been expressed. Again, the word "receipts" expressly excludes receipts or proceeds from the use or sale of real property. Appellant's equipment to the extent of millions of dollars is housed in, and in large part is permanently affixed to, buildings which are a part of the realty. Are the receipts from that source, pro tanto, to be deducted? Who shall say? How is anyone to know? It may confidently be assumed that the city will insist that no deductions are to be made in that respect. As confidently may it be assumed that the appellant will insist to the contrary. Many other questions are raised by the wording of this section, all of which lead to confusion in the attempt to interpret them. The majority opinion says that the definition of "Gross Income" in the present ordinance is substantially the same as that contained in the act of West Virginia, considered and sustained in the case of Hope Natural Gas Co. v. Hall, State Tax Commissioner, 274 U. S. 284. I do not so read it. That act provided that persons engaging in certain businesses should pay a tax "equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer (except as hereinafter provided) multiplied by the respective rates". The language is not only entirely different, but upon its very face it shows that the tax is

to be computed on the gross sales of the products. No such certainty or definiteness appears here. The rule by which the tax is to be measured should be definite and certain, and its definiteness and certainty should appear from [fol. 52] its provisions and not be the product of either litigation or compromise.

For the reasons suggested, and rather briefly stated in the light of the extended discussion in the briefs, I dissent.

Steinert, J.

[fol. 53] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER DENYING REHEARING—Filed June 14, 1933

The court having considered the appellant's petition for a rehearing herein;

It is ordered that the said petition be and it hereby is denied.

Dated this 14 day of June, 1933.

By the Court:

Walter B. Beals, Chief Justice.

[File endorsement omitted.]

[fol. 54] IN SUPREME COURT OF WASHINGTON

No. 24327

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY, Appellant,

vs.

CITY OF SEATTLE et al., Respondents

JUDGMENT—June 14, 1933

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 14th day

of June, A. D. 1933, on motion of A. C. Van Soelen, Esquire, of counsel for respondents, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; and that the said City of Seattle et al. have and recover of and from the said The Pacific Telephone & Telegraph Co. and from the United States Fidelity and Guaranty Co. surety the costs of this action taxed and allowed at One Hundred & Fifty-three & 40/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 55] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

No. 24327

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON TO THE SUPREME COURT OF THE UNITED STATES—Filed June 19, 1933

To the Chief Justice of the Supreme Court of the State of Washington:

The Pacific Telephone and Telegraph Company, a California corporation, your petitioner, respectfully shows:

I

Your petitioner is the appellant in the above entitled cause.

II

Your petitioner filed an amended complaint in the Superior Court of the State of Washington, for King County, on the 17th day of October, 1932, asking for an injunction against the respondents above named, restraining them from enforcing, as against this petitioner, Ordinance No. 62662, entitled:

"An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties,"

which ordinance was passed by the City Council of the [fol. 56] City of Seattle, Washington, on the 23rd day of May, 1932, and approved by the Acting Mayor of said City on the 25th day of May, 1932, upon the ground that the said ordinance was violative of the statutes and Constitution of the State of Washington and of the Constitution of the United States. A copy of said ordinance was attached to the said amended complaint as Exhibit "A". The grounds on which said ordinance is claimed to be invalid by this petitioner are all more particularly set forth in paragraph XIX of the said amended complaint.

III

The respondents appeared in the said Superior Court and demurred to the said amended complaint upon the ground that the said complaint did not state facts sufficient to constitute a cause of action, which demurrer was, by the said Superior Court, sustained on the 18th day of October, 1932. That your petitioner thereupon elected to stand upon its amended complaint and declined to plead further, and that the said Superior Court thereupon, on the said 18th day of October, 1932, dismissed the said action; that thereafter an appeal was prosecuted by your petitioner from said judgment of dismissal to the Supreme Court of the State of Washington, and upon said appeal the said decree of the Superior Court of the State of Washington, for King County, was affirmed by the Supreme Court of the State of Washington, in an opinion filed on the 21st day of April, 1933; that thereafter, within the thirty days allowed by the statutes of the State of Washington, your petitioner applied for a rehearing of said cause, which was denied by the said Supreme Court of the State of Washington on the 14th day of June, 1933, and the final judgment of the said Supreme Court of the State of Washington was entered on the 14th day of June, 1933, [fol. 57] affirming the said judgment of the Superior Court of the State of Washington, for King County.

IV

That the said Supreme Court of the State of Washington is the highest court of said state in which a decision can be had upon the matters alleged by your petitioner in this suit.

V

That in said cause there is drawn in question the validity of an ordinance of a municipal corporation existing by and under the laws of the State of Washington, on the ground that the said ordinance is repugnant to the Constitution and Laws of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that the said ordinance violates the Fourteenth Amendment to the Constitution of the United States.

VI

That, therefore, in accordance with the Judicial Code, Section 237(a) (U. S. C., Title 28, Section 344), and in accordance with the Rules of the Supreme Court of the United States (Rule 46, Par. 2), your petitioner respectfully shows this court that the case is one in which, under the legislation in force when the Act of January 31, 1928 (45 Stat. 54), was passed, to-wit, under Section 237(a) of the Judicial Code (U. S. C., Title 28, Section 344), a review could be had in the Supreme Court of the United States on writ of error, as a matter of right.

[fol. 58]

VII

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors filed herewith pursuant to Rules 9 and 46 of the Supreme Court of the United States; and there is likewise filed herewith a statement as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore your petitioner prays for the allowance of an appeal from the said Supreme Court of the State of Washington, the highest court of said state in which a decision can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of Washington may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the clerk of the Supreme Court of the State of Washington under his hand and the seal of the said

court, may be sent to the Supreme Court of the United States, as provided by law, and that said appeal may operate as a supersedeas, and that an order be made touching the security to be required of the petitioner, and that the supersedeas bond tendered by the petitioner be approved.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, McMicken, Ramsey, Rupp & Schweppe, Attorneys for Petitioner, 660-671 Colman Building, Seattle, Washington.

[fol. 59] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

No. 24327

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed June 19, 1933

The petitioner assigns the following errors in the record and proceedings in this cause:

I

The Supreme Court of the State of Washington erred in refusing to hold that Ordinance No. 62662 of the City of Seattle, Washington, was so vague and indefinite as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that the definition of gross income in said ordinance renders it impossible for the appellant to compute, with reasonable certainty, the amount of the taxes, if any, owing by it thereunder, and subjects appellant to criminal penalties for noncompliance with the said vague and indefinite terms of said ordinance.

[fol. 60] II

The Supreme Court of the State of Washington erred in refusing to hold that said ordinance is so vague and indefinite as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

in that the said ordinance fixes no method of computation whereby appellant, with reasonable certainty, can segregate its interstate business from its business conducted wholly within the City of Seattle, nor any method whereby appellant can, with reasonable certainty, segregate its business conducted wholly within the City of Seattle from its intrastate business conducted between the said City of Seattle and points outside said city.

III

The Supreme Court of the State of Washington erred in refusing to hold that the said ordinance conflicts with the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that appellant is not now and for more than twenty-one months last past has not been earning a fair return upon its property within the City of Seattle used and useful in the public service, and that said license fee, or any portion thereof, required by said ordinance is arbitrary, unreasonable, oppressive, and confiscatory of appellant's property.

IV

The Supreme Court of the State of Washington erred in refusing to hold that the said ordinance violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that said ordinance undertakes completely to prohibit the doing of an entirely law-[fol. 61] ful business except upon payment of a license fee, although said City confers no privilege to do business upon appellant inasmuch as appellant's business in said City is regulated exclusively by the Department of Public Works of the State of Washington under the public service laws of said state, and appellant cannot withdraw from its business, or any portion thereof, in said City of Seattle, without the consent of the State of Washington.

V

The Supreme Court of the State of Washington erred in refusing to hold that the said ordinance conflicts with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, in that the license fees fixed by said ordinance are arbitrary and discrimi-

natory because different rates are fixed by said ordinance on businesses (public utilities) in the same general class.

VI

The Supreme Court of the State of Washington erred in refusing to hold that the said ordinance conflicts with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, in that the license tax imposed upon gross income thereunder, being a direct property tax, constitutes an additional property tax on the property of the appellant and is levied on an unequal and discriminatory basis on the public utilities and other persons, firms and corporations included in and affected by the said ordinance.

Wherefore, on account of the errors hereinbefore assigned, petitioner prays that the said judgment of the [fols. 62-81] Supreme Court of the State of Washington, dated the 14th day of June, 1933, in the above entitled cause, be reversed and judgment rendered in favor of this appellant.

Dated this 19th day of June, 1933.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, McMicken, Ramsey, Rupp & Schweppe, Attorneys for Appellant.

660-671 Colman Building, Seattle, Washington.

[fol. 82] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

No. 24327

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant,

vs.

THE CITY OF SEATTLE, a Municipal Corporation, and HARRY W. CARROLL, as Comptroller of the City of Seattle, Respondents

ORDER ALLOWING APPEAL—Filed June 19, 1933

The petition of The Pacific Telephone and Telegraph Company, the appellant in the above entitled action, for an

appeal in the above cause to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Washington, having been presented herein, accompanied by an assignment of errors and statement as to jurisdiction, all as provided by Rule 46 of the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Washington on June 14, 1933, as prayed in said petition, and that the clerk of the Supreme Court of the State of Washington shall, within sixty days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of the court, a true copy of the material parts of the record herein, which shall be designated by a præcipe or stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further ordered that the said appellant shall give a [fol. 83] good and sufficient supersedeas bond, in the sum of twenty-five thousand Dollars ($25,000.00), that said appellant shall prosecute said appeal to effect, and answer all damages and costs if it fails to make its plea good; and that said supersedeas bond, when filed and approved, shall stay the sending down to the Superior Court of the remittitur herein and of all proceedings in this cause, and the enforcement of Ordinance No. 62662 of the City of Seattle, Washington, or any part thereof, against appellant, until the final disposition of this cause by the Supreme Court of the United States.

Done in open court this 19th day of June, 1933.

Walter B. Beals, Chief Justice of the Supreme Court of the State of Washington.

[fols. 84–86] Supersedeas bond on appeal for $25,000, approved and filed June 19, 1933, omitted in printing.

[fols. 87–89] Citation, in usual form, showing service on A. C. Van Soelen et al., filed June 21, 1933, omitted in printing.

[fol. 90] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

PROOF OF SERVICE OF PAPERS UNDER RULE 12, UNITED STATES SUPREME COURT RULES—Filed June 21, 1933

Service, pursuant to Rule 12, paragraph 2, Rules of the Supreme Court of the United States, is hereby acknowledged of copies of the following papers in the above entitled cause:

1. Petition for Appeal.
2. Order Allowing Appeal.
3. Assignment of Errors.
4. Statement as to Jurisdiction.

Dated this 20th day of June, 1933.

A. C. Van Soelen, Corporation Counsel of the City of Seattle; Walter L. Baumgartner, Assistant Corporation Counsel of the City of Seattle; Charles V. Hoard, Attorneys for Appellees.

Address: 515 County-City Building, Seattle, Washington.

[fol. 91] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

No. 24327

[Title omitted]

PRÆCIPE FOR TRANSCRIPT ON APPEAL—Filed June 21, 1933

To the Clerk of the above-entitled court:

Please prepare a transcript of record on appeal of the above entitled cause to the Supreme Court of the United States, including therein the following papers and documents:

1. Amended Complaint.
2. Demurrer to Amended Complaint.

3. Judgment and Decree of Dismissal, including Notice of Appeal endorsed thereon.
4. Bond on Appeal to the Supreme Court of the State of Washington.
5. Certificate of Clerk of the Superior Court.
6. Opinion of the Supreme Court of the State of Washington, and dissenting opinion.
7. Order denying Petition for Rehearing.
8. Judgment and Decree of the Supreme Court of the State of Washington.
9. Petition for Appeal to the Supreme Court of the United States.
19. Assignment of Errors.
11. Statement as to Jurisdiction of the Supreme Court of the United States.
12. Order Allowing Appeal and Fixing Supersedeas.
13. Supersedeas Bond.
[fol. 92] 14. Citation.
15. Statement directing attention to Rule 12, United States Supreme Court Rules.
16. Proof of Service of papers required by Rule 12, United States Supreme Court Rules.
17. Præcipe for Transcript on Appeal.
18. Clerk's Certificate.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp, Alfred J. Schweppe, Attorneys for Appellant.

Service of the foregoing Præcipe, by receipt of a copy thereof, is acknowledged this 20 day of June, 1933.

A. C. Van Soelen, Corporation Counsel of the City of Seattle; Walter L. Baumgartner, Assistant Corporation Counsel of the City of Seattle; Charles V. Hoard, Attorneys for Respondents.

[fol. 93] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 94] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Aug. 19, 1933

(Pursuant to Rule 13 (9))

[fol. 95] Comes now the appellant and adopts its assignments of error as its statement of the points to be relied

upon, and represents that the whole of the record, as filed, is necessary for the consideration of the case.

Dated at Seattle, Washington, August 8, 1933.

Maurice McMicken, H. J. Ramsey, Otto B. Rupp,
Alfred J. Schweppe, Attorneys for Appellant.

[fol. 96] [File endorsement omitted.]

Endorsed on cover: File No. 37,967. Washington Supreme Court. Term No. 364. The Pacific Telephone and Telegraph Company, appellant, vs. The City of Seattle and Harry W. Carroll, as Comptroller, etc. Filed August 19, 1933. No. 364, O. T., 1933.

INDEX.

SUBJECT INDEX.

	Page
Statement as to jurisdiction	1
Statutory provisions sustaining jurisdiction	1
The statute or ordinance of the State the validity of which is involved	2
Date of the judgment sought to be reviewed and date upon which application for appeal was presented	5
The nature of the case and the rulings below	6
Cases believed to sustain the jurisdiction	18

TABLE OF CASES CITED.

Bryant v. Zimmerman, 278 U. S. 63	18
Champlin Refining Co. v. Commission, 286 U. S. 210	18
Connally v. General Construction Co., 269 U. S. 385	18
Great Northern Ry. Co. v. Minnesota, 278 U. S. 503	2
King Manufacturing Co. v. City Council of Augusta, 277 U. S. 100	18
Larson v. South Dakota, 278 U. S. 429	2
Missouri & Kansas Interurban Ry. Co. v. Olathe, 222 U. S. 185	6
Nashville, etc., Ry. v. White, 278 U. S. 456	2
Puget Sound Power & Light Co. v. King County, 264 U. S. 22	6
Sultan Ry. Co. v. Dept. of Labor, 277 U. S. 135	18

STATUTES CITED.

Act of July 24, 1866 (14 Stat. L. 221)	12
Act of January 31, 1928, as amended by the Act of April 26, 1928, 45 Stat. 54; 45 Stat. 466 (28 U. S. C. 861 (a) and (b))	2
Act to Regulate Commerce, Section 20 (41 Stat. L. 474)	8
Constitution of the United States, 14th Amendment	16, 17
Judicial Code, Section 237 (a) (28 U. S. C. 344)	2, 19
Ordinance No. 62662 of the City of Seattle, Section 1	3
Section 2	3
Section 3	3
Section 5	4
Section 15	4
Section 16	4
Section 24	5

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 364

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, APPELLANT,

vs.

THE CITY OF SEATTLE AND HARRY W. CARROLL, AS COMPTROLLER OF THE CITY OF SEATTLE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Judicial

Code, § 237 (*a*) (28 U. S. Code § 344), reading, to the extent relevent here, as follows:

> "SECTION 237. (*a*) A final judgment or decree in any suit in the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *"

The remedy by writ of error, under the foregoing section, has been abolished and an appeal substituted.

Act of January 31, 1928, as amended by the Act of April 26, 1928; 45 Stat. 54; 45 Stat. 466 (28 U. S. Code, § § 861 *a*, 861 *b*);

Nashville, etc., Ry. v. *White*, 278 U. S. 456, 460;

Great Northern Ry. Co. v. *Minnesota*, 278 U. S. 503, 506;

Larson v. *South Dakota*, 278 U. S. 429, 432.

B.

The Statute or Ordinance of the State the Validity of Which is Involved.

The validity of a licensing ordinance of the City of Seattle, Washington, a municipal corporation existing under and by virtue of the laws of the State of Washington is involved. The ordinance is No. 62662. The pertinent provisions thereof are:

"ORDINANCE No. 62662.

An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties.

Be it ordanied by the City of Seattle as follows:

SECTION 1. *Exercise of Revenue License Power.*—The provisions of this ordinance shall be deemed an exercise of the powers of the City of Seattle to license for revenue.

SECTION 2. *Definitions.*—In construing the provisions of this ordinance, save wl .1 otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied:

Gross Income.—The value proceeding or accruing from the sale of tangible property or service, and receipts, (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

* * * * * * *

SECTION 3. *'Occupation License' Required.*—After the 1st day of July, 1932, no person shall engage in or carry any business. occupation, pursuit or privilege for which a license fee or tax is imposed on this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an 'Occupation License.'

Any person engaging in, or carrying on, more than on such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in, or carries on, any business subject to tax hereunder without having his 'Occupation License' so to do, shall be guilty of a violation of this ordinance for each day during which the

business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

SECTION 5. *Occupations Subject to Tax—Amount.*—There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income, as follows:

(*a*) Upon every person engaged in or carrying on a telegraph and/or telephone business, a fee or tax equal to four per cent. (4%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

* * * * * * *

SECTION 15. *Taxpayer to Keep Books and Records—Returns Confidential.*—It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the City Comptroller, pursuant to this ordinance, shall not be made public, nor shall they be subject to the inspection of any person except the Mayor, the Corporation Counsel, the City Comptroller, or his authorized agent, and members of the City Council.

SECTION 16. *Comptroller to Investigate Returns.*—If any taxpayer fails to apply for license or make his

return, or if the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements, as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place for an investigation of the correctness of the return and may issue a subpoena to the taxpayer, or any other person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpoena, require him, or any person, to bring with him such books, records and papers as may be necessary.

* * * * * * *

SECTION 24. *Penalty.*—Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the City Jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment."

C

The date of the final judgment of the Supreme Court of the State of Washington sought to be reviewed is June 14, 1933.

The judgment of the Supreme Court of the State of Washington, which was a judgment affirming a dismissal of the

action, is a "final judgment" within the meaning of Judicial Code 237.

Missouri & Kansas Interurban Ry. Co. v. *Olathe*, 222 U. S. 185.

The time for taking the appeal began to run on the date of such final judgment, to-wit, June 14, 1933. (See *Puget Sound Power & Light Co.* v. *King County*, 264 U. S. 22, where the time for appealing from the judgments of the Supreme Court of the State of Washington is considered.)

The date on which the application for appeal was presented and the appeal allowed is June 19, 1933.

D.

The Nature of the Case and the Rulings Below.

The nature of the case and the rulings below which are deemed to bring the case within the jurisdictional provision relied on are as follows:

The appellant, The Pacific Telephone and Telegraph Company, commenced this suit in the Superior Court of the State of Washington for King County to enjoin the appellees from collecting of the appellant the license fees upon gross income prescribed by Ordinance No. 62662 of the City of Seattle, Washington, and to restrain any attempt by the said City to enforce the ordinance and its penalties against the appellant.

The appellant filed its amended complaint in the above entitled cause, alleging the following material facts:

That appellant is a corporation duly organized under and by virtue of the laws of the State of California, duly licensed to do business in the State of Washington (Paragraph I).

That appellant owns and operates a public telephone and telegraph system in the State of Washington and in the

States of California, Oregon and a part of Idaho, furnishing to the public telephone exchange service and both intrastate and interstate telephone toll service and telegraph service (Paragraph II).

That the City of Seattle is a municipal corporation organized under the laws of the State of Washington, and that the appellee Harry W. Carroll is the duly elected, qualified and acting comptroller of the City of Seattle (Paragraph III).

That on May 23, 1932, the city council of the City of Seattle passed Ordinance No. 62662, entitled:

> "An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties."

which said ordinance was on May 25, 1932, approved by the acting mayor of said city. That a copy of said ordinance is attached to the said amended complaint and made a part thereof (Paragraph IV):

That the State of Washington, under tariffs approved by the Department of Public Works of the State of Washington, is divided into a number of telephone exchange areas. Telephone exchange service is service between telephone stations within the same exchange area, and telephone toll service is telephone service between telephone stations located in different exchange areas. Among said exchange areas in the State of Washington is the "Seattle Exchange," but which last mentioned exchange area includes several thousand telephone stations outside the limits of the City of Seattle. Said telephone exchange service and intrastate telephone toll service together constitute the major portion of appellant's telephone service within the State of Washington. Telegraph service is both intrastate and interstate,

and intrastate telegraph service is service between points within the State of Washington (Paragraph V).

That by authorization of the Department of Public Works of Washington given prior to 1931, and in pursuance of its statutory powers, the Seattle Exchange, as established and at all times since maintained, embraces an area including the City of Seattle and the territory immediately adjacent thereto (Paragraph VI).

That the Interstate Commerce Commission, in pursuance of its statutory powers, has prescribed the form of accounts to be kept by telephone companies, subject to the Act to Regulate Commerce, as amended (41 Stat. L. 474), and in particular in accordance with Section 20 of said Act as amended; that appellant is one of the telephone companies in the United States subject to said Act and is required by law to keep its accounts in the form prescribed by the Interstate Commerce Commission; that the Department of Public Works of the State of Washington, by order No. 5251, dated October 31, 1921, has adopted and has prescribed for all telephone companies subject to its jurisdiction the same form of accounts as that adopted and prescribed by the Interstate Commerce Commission (Paragraph VII).

That in order for appellant to furnish its customers receiving exchange service in the Seattle Exchange with telephone exchange service, as hereinbefore defined, it is necessary for appellant to provide equipment known as "Central Office Equipment"; that the term "Central Office Equipment" is defined both by the Interstate Commerce Commission and by the regulatory body of the State of Washington as follows:

> *"Central Office Telephone Equipment.*
>
> This account should include the cost of local and toll switchboards, chief operators', monitors', and supervisors' desks and tables, wire chiefs' testing outfits,

main and intermediate frames, cables, and jumper wires, call registers or meters, relay racks and coil racks, and power plants, including rectifiers, generators, engines, motors, batteries, power switchboards, meters, and fuse boards; telephone and telegraph instruments, and other electrical instruments and apparatus in the central office devoted to the operation of the telephone plant'' (Paragraph VIII).

That without the use of central office equipment, it is impossible for appellant to render any telephone exchange service at all; that the investment by said appellant in central office equipment located wholly inside the city limits of Seattle is in excess of $10,000,000; that in order to render economical and efficient telephone exchange service to its customers receiving exchange service in the Seattle Exchange, it is necessary for appellant to run its wires or cables to some point, same being the wire center point within various districts within the Seattle Exchange, and which wires and cables are connected to the central office equipment owned and operated by appellant in the Seattle Exchange; that said districts are known as central office districts and are eleven in number; that in order for appellant's customers receiving exchange service in any one of said districts to communicate by telephone with its customers receiving exchange service within any one of said other ten central office districts, it is necessary for appellant to connect, by means of conduits and cables, the central office equipment installed in any one of said districts with the central office equipment installed in the remaining ten districts; that the central office equipment installed in each of said central office districts, the aggregate investment by appellant in which said central office equipment exceeds, as aforesaid, the sum of $10,000,000, is necessarily housed in eleven buildings located at the central wire point in said

central office districts and called central office buildings; that said buildings and the land on which said buildings are located are (with the exception of the Glendale central office) owned by said appellant, and all of said buildings, including the Glendale central office building, are situated wholly inside the city limits of Seattle, and the investment of said appellant in the land and buildings owned as aforesaid now exceeds, and did exceed in 1931, the sum of $3,000,000 (Paragraph IX).

That appellant's said customers receiving exchange service within the Seattle Exchange, but receiving such service outside the city limits of Seattle, are furnished exchange service by the use of the central office equipment installed as aforesaid in the aforesaid central office buildings; that said central office equipment is necessarily connected with the telephone equipment consisting of telephone stations, drop wires, protectors, coin boxes, etc., installed in the places of business or residences of said customers receiving service in the Seattle Exchange but outside the city limits thereof; that the connection between said central office equipment installed as aforesaid in said central office buildings and the telephone equipment installed on the premsies of appellant's customers receiving exchange service outside the city limits of Seattle, but within the Seattle Exchange, is necessarily made by means of wires strung on poles, or cables strung on poles, or laid in conduits; that said poles, conduits, wires and cables are located partly inside and partly outside the city limits of Seattle (Paragraph X).

That said lands and buildings owned and situated as aforesaid are used and of necessity used in the rendition of appellant's telephone exchange service in said Seattle Exchange; that it is impossible for appellant to determine or estimate the proportion of the moneys received by it in Seattle in 1931 from its customers receiving exchange serv-

ice in the Seattle Exchange, whether such customers receive such service inside or outside the city limits of Seattle, due to the use and necessary use by said appellant of said lands and the buildings thereon in the rendition of said exchange service (Paragraph XI).

That said appellant was engaged in 1931 not only in rendering telephone exchange service but also telephone toll service; that telephone toll service is divided into two classes, intrastate toll service and interstate toll service; that intrastate toll service is telephone service between telephone stations located in different exchange areas, all of which areas are located within the State of Washington; and interstate toll service is telephone service between telephone stations located in different exchange areas within the State of Washington and telephone stations located in different exchange areas outside the State of Washington. That in order for appellant's customers receiving intrastate toll service inside the city limits of Seattle to communicate with appellant's customers receiving intrastate toll service in areas outside the Seattle Exchange, it was necessary in 1931 and still is necessary for appellant to connect its telephone plant located inside the city limits of Seattle, including said central office equipment housed as aforesaid in said central office buildings, with appellant's telephone plants located in exchange areas outside the Seattle Exchange; that in order for appellant's customers receiving telephone service outside the city limits of Seattle, but within the Seattle Exchange area, to communicate with appellant's customers receiving intrastate toll service furnished by appellant in exchange areas other than the Seattle Exchange, it was necessary, in 1931 and still is, for appellant to connect not only the telephone plant of appellant located inside the city limits of Seattle, in which said appellant has invested capital of many millions of dollars,

but also the telephone plant of appellant, including, among other items of property, poles, wires, cables, conduits, telephone stations, drop wires, protectors, coin boxes, etc. (but no central office equipment or land or buildings), located outside the city limits of Seattle but within the Seattle Exchange, with the telephone plant of appellant located in exchange areas outside the Seattle Exchange area; that said appellant had, in the year 1931, a capital investment in plant, land and buildings, all of which were located outside the Seattle Exchange but within the State of Washington, and used and necessarily used in the operation of its intrastate telephone toll service, in excess of $20,000,000, and which said plant, land and buildings were necessary to the rendition by appellant of intrastate telephone toll service to its customers receiving service within the Seattle Exchange (Paragraph XII).

That it is impossible for appellant to determine or estimate the proportion of the money received by it in 1931 from its customers in the Seattle Exchange receiving intrastate toll service, whether such customers receive such service inside or outside the city limits of Seattle, due to the use and necessary use by said appellant of (*a*) the lands and the buildings thereon owned and situated inside the city limits of Seattle and (*b*) the lands and the buildings thereon situated in other exchange areas within the State of Washington, in the rendition of said intrastate toll service (Paragraph XIII).

That appellant is engaged in rendering intrastate and interstate telegraph service; that it had, long prior to 1931, duly filed with the Postmaster General of the United States its written acceptance of the restrictions and obligations required by the Act of Congress of July 24, 1866 (14 Stat. L. 221); that appellant's customers residing in the City of Seattle in 1931, desiring to transmit messages by telegraph

to persons residing at points other than Seattle in the State of Washington, tendered to appellant, either in person or by telephone, such messages at the aforesaid central office buildings of appellant located inside the city limits of Seattle; that said messages were accepted by and transmitted telegraphically by appellant; that some of appellant's customers residing outside the City of Seattle but within the area of the Seattle Exchange tendered, in 1931, by telephone to appellant, messages to be transmitted telegraphically by appellant to points in the State of Washington other than Seattle, which said messages were accepted by and transmitted telegraphically by appellant; that all of said messages, tendered as aforesaid and accepted as aforesaid in the year 1931, were transmitted from the central office buildings of said appellant located in the City of Seattle by the use of central office equipment housed in said central office buildings and by the use of poles, wires, cables and conduits extending between said central office buildings located in the City of Seattle to central office buildings owned by appellant located in points other than Seattle in the State of Washington and by the use of central office equipment housed in said buildings located as aforesaid in points other than Seattle in the State of Washington (Paragraph XIV).

That it is impossible for appellant to determine or estimate the proportion of the money received by it in 1931 from its customers employing its intrastate telegraph service, whether such customers employing such service resided inside the city limits of Seattle or outside the city limits of Seattle but within the area of the Seattle Exchange, due to the use and necessary use by said appellant of (*a*) the lands and the buildings thereon owned and situated inside the city limits of Seattle and (*b*) the lands and the buildings thereon situated in points other than Seattle in the State of Wash-

ington, which said last mentioned land and buildings were in 1931 and are now owned by appellant (Paragraph XV).

That appellant's telephone and telegraph business in the City of Seattle is conducted efficiently and economically; that appellant's net earnings derived from its telephone and telegraph business in the Seattle Exchange during the first three months of 1932, stated in rate per cent annual return upon the cost of appellant's property, used and useful in furnishing said service in said exchange and exclusively devoted to the rendition thereof, was not in excess of 3.25 per cent; that appellant's net earnings derived from its telephone and telegraph business in the City of Seattle, stated in rate per cent annual return upon the cost of the property located in the City of Seattle and used and useful in furnishing telephone and telegraph service and exclusively devoted to the rendition thereof, during the first three months of 1932, was somewhat less than 3.25 per cent; that the net earnings of appellant on said property, together with any additions made thereto during the months of April, May, June, July, August and September, 1932, are now declining, and, based upon past and present experience, will continue to decline throughout the year 1932 (Paragraph XVI).

That the appellees have at all times since the effective date of said ordinance threatened and still threaten to enforce the same and the penalties thereof against the appellant (Paragraph XVII).

That the appellant has paid all taxes of any and every kind levied either by or for the State of Washington, the County of King, a municipal corporation of the State of Washington, or the City of Seattle, against all of its property of any and every kind for the tax years prior to 1931; that on March 15, 1932, the appellant paid to the treasurer

of King County the sum of $96,908.41, being the total 1931 tax, less 3 per cent rebate, on the real property owned by the appellant in the City of Seattle, and of this amount $44,164.01 was the tax levied for the City of Seattle against the said real property owned by this appellant in the City of Seattle, the remainder of said amount being the tax levied for the State of Washington, for the County of King, a municipal corporation of the State of Washington in which the City of Seattle is located, for Seattle School District No. 1, and for the Port of Seattle, a municipal corporation of the State of Washington; that on March 15, 1932, the appellant paid to the treasurer of King County $302,590.97, being the first half of the 1931 tax levied against all of the appellant's personal property located in King County, Washington, $126,664.52 of said amount being the amount of taxes levied for the City of Seattle against the personal property of the appellant located inside the city limits of Seattle, the remainder of said amount being the amount of taxes levied for the State of Washington, for the County of King, for Seattle School District No. 1 and various other school districts in said County of King, for the Port of Seattle, a municipal corporation of the State of Washington, and for various towns and road districts in said county located outside the city limits of Seattle; that the remaining one-half of said personal property tax for the year 1931 can be paid without penalty on or before November 30, 1932 (Paragraph XVIII).

That said Ordinance No. 62662 is invalid, *inter alia,* upon the following grounds:

1. That said ordinance conflicts with the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that said ordinance is so vague and indefinite in its definition of gross income as to render it

impossible for appellant to compute, with reasonable certainty, the amount of the tax, if any, owing by it thereunder, and subjects appellant to criminal penalties for noncompliance with the said vague and indefinite terms of said ordinance.

2. That said ordinance conflicts with the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that the said ordinance fixes no method of computation whereby appellant, with reasonable certainty, can segregate its interstate business from its business conducted wholly within the City of Seattle, nor any method whereby appellant can, with reasonable certainty, segregate its business conducted wholly within the City of Seattle from its intrastate business conducted between the said City of Seattle and points outside said city.

3. That the said ordinance conflicts with the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that appellant is not now and for more than twenty-one months last past has not been earning a fair return upon its property within the City of Seattle used and useful in the public service, and that said license fee, or any portion thereof, required by said ordinance is arbitrary, unreasonable, oppressive, and confiscatory of appellant's property.

4. That the said ordinance violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that said ordinance undertakes completely to prohibit the doing of an entirely lawful business except upon payment of a license fee with respect to a business that the said City has no power to regulate.

5. That the said ordinance conflicts with the equal protection clause of the Fourteenth Amendment to the Consti-

tution of the United States, in that the license fees fixed by said ordinance are arbitrary and discriminatory because different rates are fixed by said ordinance on businesses (public utilities) in the same general class.

6. That the said ordinance conflicts with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, in that the license tax imposed upon gross income thereunder, being a direct property tax, constitutes an additional property tax on the property of the appellant and is levied on an unequal and discriminatory basis upon the public utilities included in and affected by said ordinance (Paragraph XIX).

That the General Fund of the appellee City of Seattle is now heavily overdrawn, and that the banks in the said city have since May, 1932, refused to cash or accept any and all warrants on said fund, and that warrants on said fund cannot be cashed, and that, even if said license tax were computable by appellant with reasonable certainty, and appellant paid the same, the time of re-payment thereof to appellant by said city is wholly conjectural and uncertain (Paragraph XX).

That appellant has no adequate remedy at law, and that unless equitable relief by injunction, temporary and permanent, is granted by this court, appellant will be deprived of its rights as hereinbefore alleged; that the loss resulting from the enforcement of said ordinance is irreparable, and that the penalties provided by said ordinance are so severe and will lead to such a multiplicity of suits and prosecutions that appellant has no adequate remedy except in a court of equity (Paragraph XXI).

The appellees demurred to the appellant's amended complaint upon the ground that the said complaint did not state facts sufficient to constitute a cause of action, which

demurrer was by the said Superior Court sustained on the 18th day of October, 1932.

The appellant elected to stand upon its amended complaint and declined to plead further; and thereupon the said Superior Court on the said 18th day of October, 1932, entered its judgment and decree dismissing the action.

Thereafter an appeal was prosecuted by appellant from said judgment of dismissal to the Supreme Court of the State of Washington, and upon the said appeal of the said judgment and decree of dismissal of the Superior Court of the State of Washington for King County was affirmed by the Supreme Court of the State of Washington, in an opinion filed on the 21st day of April, 1933.

Thereafter, within the thirty days allowed by the statutes of the State of Washington, the appellant applied for a rehearing of said cause, which was denied by the Supreme Court of the State of Washington on the 14th day of June, 1933, and the final judgment of the Supreme Court of the State of Washington was entered on the 14th day of June, 1933.

E.

Cases Believed to Sustain the Jurisdiction.

The following cases are believed to sustain the jurisdiction of this court:

King Manufacturing Co. v. *City Council of Augusta,* 277 U. S. 100;

Sultan Ry. Co. v. *Dept. of Labor,* 277 U. S. 135;

Bryant v. *Zimmermann,* 278 U. S. 63, 67;

Connally v. *General Construction Co.,* 269 U. S. 385, 391;

Champlin Refining Co. v. *Commission,* 286 U. S. 210, 243.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 (*a*) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Section 344).

Respectfully submitted,

MAURICE MCMICKEN,
H. J. RAMSEY,
OTTO B. RUPP,
ALFRED J. SCHWEPPE,
Attorneys for Appellant.

(3797)

No. 364

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,

Appellant,

vs.

THE CITY OF SEATTLE, a municipal corporation, and HARRY W. CARROLL, as Comptroller of the City of Seattle,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT

OTTO B. RUPP,

ALFRED SUTRO,

Attorneys for Appellant.

MCMICKEN, RAMSEY, RUPP & SCHWEPPE,

PILLSBURY, MADISON & SUTRO,

Of Counsel.

THE ARGUS PRESS, SEATTLE

INDEX

	Page
Statement of the Case	1
Specification of Error	6
Argument	7

AUTHORITIES

	Page
Abbott v. Andrews, 45 S. W. (2d) 568	20
C. B. & Q. R. R. Co. v. People, 77 Ill. 443	20
Champlin Refining Co. v. Corporation Commissioner of Oklahoma, 286 U. S. 210	21
Coke's 4th Inst. p. 42	24
Commonwealth v. P. Lorillard Co., 129 Va. 74	11
Connally v. General Construction Co., 269 U. S. 385	20
Collins v. Kentucky, 234 U. S. 634, 638	23
Cohens v. Virginia, 6 Wheat. 264, 399	25
Continental Mutual Sav. Bank v. Elliott, 166 Wash. 283, 300	25
Edwards v. Browne Coal Co., 213 Iowa 1027	20
Ex parte Lucas, 161 Ark. 180	20
Ex parte Schmolke, 199 Cal. 42	20
In re Finance Act (1894) and *Studdert* (1900) 2 I. R. 400, C. A.	24
International & G. N. R. R. Co. v. Mallard, 277 S. W. 1051	20
International Harvester Co. v. Kentucky, 234 U. S. 216, 222	23
Lewis' Sutherland Statutory Construction (2d ed.) §420	9
Louisville & N. R. Co. v. Commonwealth, 99 Ky. 132	19
Mayhew v. Nelson, 346 Ill. 381	19
People v. Pace, 73 Cal. App. 548	20
Railroad Commission v. Grand Trunk Western R. Co., 179 Ind. 255	19
Small Co. v. American Sugar Refining Co., 267 U. S. 239	23
State v. Karr, 64 Neb. 514	8
State v. Express Co., 60 N. H. 219, 244	10
State v. West Side Street Ry. Co., 146 Mo. 155	12, 15
State ex rel. Husting v. State Board of Canvassers, 159 Wis. 216	19

AUTHORITIES (Continued)

	Page
State v. International & G. N. Ry. Co., 165 S. W. 892	20
State v. Powles, 90 Wash. 112	20
State v. Parker, 183 Minn. 588	20
State v. Humble Pipe Line Co., 112 Tex. 375	11
State ex rel. Wyatt v. Ashbrook, 154 Mo. 375	11
Standard Oil Co. v. State, 178 Ala. 400	11
Union Tank Line Co. v. Wright, 249 U. S. 275, 286	25
Western Union Tele. Co. v. Texas, 62 Tex. 630	11
Winslett v. Case-Fowler Lbr. Co., 173 Ga. 539	11
Yo Cong Eng v. Trinidad, 271 U. S. 500, 517	23

References Required by Rules 12 and 27

Opinion below. *The Pacific Telephone and Telegraph Company v. City of Seattle et al.*, reported in 172 Wash. 649 (R. 28-42).

Jurisdictional Authority. An appeal granted June 19, 1933, pursuant to Act of February 13, 1925, c. 229 (43 Stat. 937); Judicial Code, 237(a); 28 U. S. C. A. § 344; and Rule 46, para. 2, of the rules of this court, the case being one in which, under the legislation in force when the Act of January 31, 1928, was passed (45 Stat. 54) a review could be had in the Supreme Court of the United States on writ of error as a matter of right (R. 45).

Date of Judgment, etc., June 14, 1933 (R. 42). Petition for Appeal, Assignment of Errors, and Order Allowing Appeal, June 19, 1933 (R. 43-50).

NATURE OF THE CASE. RULINGS.

The Pacific Tel. and Tel. Co. sought to enjoin the City of Seattle, Washington, and Harry W. Carroll, its comptroller, from enforcing Ordinance No. 62662 of the ordinances of the City of Seattle, imposing a tax of 4% upon the gross income, as defined in said ordinance, of appellant, upon the ground that the said definition of gross income was so vague and indefinite as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that the definition of gross income in said ordinance renders it impossible for appellant to compute, with reasonable certainty, the amount of the tax, if any, owing by it thereunder, and subjects appellant to criminal penalties for noncompliance

with the said vague and indefinite terms of said ordinance.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Appellant,

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THE CITY OF SEATTLE, a municipal corporation, and HARRY W. CARROLL, as Comptroller of the City of Seattle,
Appellees.

No. 364

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANT

The sole question here involved is whether an ordinance of the City of Seattle attempting to impose a tax of four per cent on the "gross income" of appellant, as that term is defined in the ordinance, is not invalid on the ground that the definition is so vague and indefinite as to constitute a denial of due process of law.

STATEMENT OF THE CASE

The case was tried upon an amended complaint and demurrer thereto. The trial judge sustained the demurrer, and appellant declining to plead further, a judgment dismissing the suit was entered (R. 26)

and an appeal taken to the Supreme Court of Washington, which court, one judge dissenting, affirmed the decision of the trial court, the opinion being reported in 172 Wash. 649, and is found in the record in this case on pages 28 to 42.

The amended complaint, so far as here material, recites that appellant is a California corporation, conducting a general telephone and telegraph business in the states of California, Oregon, Washington, and a portion of Idaho, furnishing to the public therein telephone exchange service and both intrastate and interstate telephone and telegraph service (R. 1). That telephone exchange service is service between telephone stations within the same exchange area; that telephone toll service is telephone service between telephone stations located in different exchange areas. That the State of Washington is divided into a number of exchange areas, among which is the Seattle Exchange. That in pursuance of its statutory powers, the Department of Public Works of Washington, the regulatory body of that state, established the Seattle Exchange prior to 1931. That as so established by the Department of Public Works the Seattle Exchange has at all times embraced not only the territory within the City of Seattle but also the territory adjacent thereto, and that there are located in the Seattle Exchange, but outside the city limits of Seattle, several thousand telephone stations, the exact number in 1931 being unknown to appellant.

That the Interstate Commerce Commission has prescribed the form of accounts to be kept by appellant, and the Department of Public Works of the State of

Washington has adopted and prescribed for telephone companies within its jurisdiction the same form of accounts. That both of these sets of accounts define the term "Central Office Equipment" (R. 3). That it is impossible for appellant to render any telephone exchange service at all without the use of central office equipment. That the investment of appellant in central office equipment located inside the city limits of Seattle is in excess of $10,000,000. That this central office equipment is housed in eleven buildings. That the company owns the land on which ten of these buildings are situated, and its investment in such land and buildings in 1931 exceeded the sum of $3,000,000. That the customers of appellant residing within the Seattle Exchange area but outside the city limits of Seattle are necessarily furnished exchange service by the use of the central office equipment housed in the buildings just referred to, plus certain telephone plant consisting of poles, wires, cable and conduits, a portion of which are located inside the city limits and a portion located outside the city limits, plus telephone stations, all of which are located outside the city limits.

That it was impossible for the appellant to estimate or determine the amount of money received by it in 1931 from its customers receiving exchange service in the Seattle Exchange but located outside the city limits of Seattle. That it was also impossible for the company to determine the amount of money received in 1931 from its customers in the Seattle Exchange, but who lived outside the city limits of Se-

attle, from intrastate telephone toll service and interstate telegraph service (R. 4-7).

That the appellant, in furnishing intrastate telephone toll service to its customers living inside the city limits of Seattle, must and does use real property owned by the appellant and situated in the cities and towns of the state other than Seattle, in which the appellant operates (R. 6).

Paragraph IV of the amended complaint recites that on May 23, 1932, the city council of the City of Seattle passed Ordinance No. 62662, entitled:

> "An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties."

Section 2 of that ordinance defines "gross income" as follows:

> "The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense what-

soever, and without any deduction on account of losses." (R. 14)

Section 5, par. 5, provides that a fee or tax equal to four per cent of the total gross income shall be paid by any person engaged in carrying on a telegraph and/or telephone business (R. 16).

Section 3 of the ordinance provides that "After the 1st day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained and being the holder of a valid and subsisting license so to do, to be known as an 'Occupation License'." It further provides that "Any taxpayer who engages in, or carries on, any business subject to tax hereunder without having his 'Occupation License' so to do, shall be guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do."

Section 24 provides that "Any person violating or failing to comply with any of the provisions of this ordinance, or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine in any sum not to exceed $300.00, or by imprisonment in the city jail for a term not exceeding ninety days, or by both such fine and imprisonment."

(The full text of the ordinance is printed in the

appendix to this brief and also at pp. 14-25 of the Record).

The appellant has made no payment to the City, but promptly brought a suit to enjoin the City from enforcing the ordinance on the ground, *inter alia*, that the definition of "gross income" in the ordinance is so vague and indefinite as to constitute a denial of due process of law, and which ground constitutes the only specification of error which the appellant here makes.

SPECIFICATION OF ERROR

The Supreme Court of the State of Washington erred in refusing to hold that Ordinance No. 62662 of the City of Seattle, Washington, was so vague and indefinite as to violate the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that the definition of gross income in said ordinance renders it impossible for the appellant to compute, with reasonable certainty, the amount of the taxes, if any, owing by it thereunder, and subjects appellant to criminal penalties for noncompliance with the said vague and indefinite terms of said ordinance.

ARGUMENT

As heretofore stated, the ordinance provides that the appellant is to pay annually to the City (a) "a tax equal to four per cent (4%) of the total gross income from [its] business in the City." Failure to pay such tax subjects the taxpayer to a fine of not to exceed $300 or to a term of imprisonment in the city jail not exceeding ninety days, or to both such fine and imprisonment, and each day constitutes a separate offense (§§ 3 and 24; R. 15, 25). Gross income is defined as follows:

> "The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

Gross income, then, according to this definition, is (a) the value proceeding or accruing from the sale of tangible property or service PLUS (b) receipts by reason of the investment of capital in the business

engaged in, including rentals, royalties, fees or other emoluments, however designated, but excluding receipts or proceeds from the *use* or sale of real property. There are, therefore, two factors in gross income, and the company is to pay 4% on the sum total of those two factors.

Now what does this first phrase, "value proceeding or accruing from the sale of tangible property or service," mean? What does the word "value" mean as used in this section of the ordinance? It is, of course, well recognized that the word "value" is the most intensely defined word in the English language. It is not possible at any time to determine the meaning of the word "value" unless the precise meaning to be given the word is denoted by the use of some other word or words, such as "sound," "reproduction," "replacement," "market." In some instances value is synonymous with cost price. If we talk of the value of the stock of a corporation, we mean the net value of its assets, which is found by deducting its indebtedness from the gross market value of its tangible and intangible property.

State v. Karr, 64 Neb. 514.

The primary definition given to the word "value" by lexicographers is "worth," but this substitution of one word for another does not aid us here.

It has been the contention of the respondent City throughout this litigation that the phrase now under discussion means gross receipts. In reason, however, that cannot be true. If a furniture dealer sells a desk, which has cost him $10, for either $10 or that amount plus cost of sale, has any value proceeded or accrued

to him from the sale of such desk? Prior to the sale he had a commodity for which he had paid $10. After the sale he had his $10 back, but not the desk. How has any value proceeded or accrued to him from such transaction?

The City in the court below sought to bolster its argument that the first phrase means gross receipts by claiming that the following clause, "without any deduction on account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses," modified the phrase, "the value proceeding or accruing from the sale of tangible property or service." But the clause just quoted does not and cannot qualify that phrase. The quoted clause modifies the provision for the payment of 4% on receipts derived from the investment of capital, etc.

Lewis' Sutherland on Statutory Construction (2d ed.) Sec. 420.

But, wholly irrespective of whether the first phrase means gross receipts or net receipts or has any meaning at all, it is, we think, clear that the second phrase in the definition is so vague and indefinite as to render the ordinance unenforceable as to appellant.

In the first place, receipts are defined as those receipts which arise "by reason of the investment of capital in the business engaged in." Now, how is the taxpayer to tell the amount of receipts which he obtained by reason of the *investment of capital* in the business engaged in? Receipts are not and cannot be the mere product of the investment of capital. Re-

ceipts are the product of investment of capital plus skill of management, labor, etc.

In *State v. Express Co.*, 60 N. H. 219, 244, it is said that a gross receipts tax is one based "not on the amount of capital invested but on the capacity for business of the managers or owners."

Illustrations of the fact that receipts are not derived solely from the investment of capital need not be given. The experience of all mankind demonstrates that managerial skill is a large factor in the amount of receipts of any business. As said in *State v. Express Co.*, 60 N. H. 219, 244:

> "The gross receipts of one company may be small and the net profits large; while of another, the gross receipts may be large and the profits small—or there may be none at all. It makes no allowance for the skill, experience, business tact or enterprise of the owners or managers, but all these which enter into the gross receipts are thus made to pay a share of the taxes."

It was conceded in the court below, and will, we think, be conceded here, that the receipts of appellant's business are not derived from the investment of capital only. But who is to determine what proportion of the appellant's receipts arises from managerial skill, labor, etc., and what proportion arises from the investment of capital? Who possesses a measuring rod by which he may ascertain these respective proportions? What criteria is the tribunal before whom this question comes to employ? If a taxpayer guesses, with the best of intentions, that one-half of his receipts are derived from the in-

vestment of capital, is he to be fined and imprisoned because someone else makes a different guess? Surely, the salutary doctrine announced by the Supreme Court of Texas in *Western Union Telegraph Co. v. Texas*, 62 Tex, 630, is peculiarly pertinent here. It is there said:

> "It is of the utmost importance for the protection of the taxpayer that tax laws should be certain both as to the thing taxed and as to the amount of the tax and the *manner of its ascertainment*, that the taxpayer may have an opportunity, *without the expense of litigation*, to pay such taxes as he may owe, and a tax law which does not accomplish this purpose *ought to be held invalid*, whether this results from an attempted exercise of power not possessed, through which the law becomes uncertain by both proper and improper subjects being combined and selected for taxation, or by the failure of the legislature *for any other reason* to furnish the *rules* by which taxes may be levied, assessed and collected."

See, also:

State v. Humble Pipe Line Co., 112 Tex. 375;

State ex rel. Wyatt v. Ashbrook, 154 Mo. 375;

Standard Oil Co. v. State, 178 Ala: 400;

Commonwealth v. P. Lorillard Co., 129 Va. 74;

Winslett v. Case-Fowler Co., 173 Ga. 539.

Moreover, the principle announced in the case of

State v. West Side Street Ry. Co., 146 Mo. 155, is squarely in point here. In that case a state statute provided that if the city granted a franchise, it was to be given to the bidder who would pay "the largest percentage yearly of the gross receipts derived from the *use* and *occupation*" of the streets, "provided that such payment shall in no case be less than two per cent of the gross earnings during the first five years of such occupation and use." The court said:

> "Upon what gross earnings is the percentage to be computed? A large capital must be invested in the machinery and appliances for conducting a street railway, aside from the tracks laid in the streets. The act seems to contemplate that the bid shall be a percentage only of the receipts derived from the use and occupation of the public property. How is the *proper proportion* of the *gross earnings* that should be attributed to the capital invested in the power stations, machinery, etc., to be ascertained? Shall it be by valuing the entire plant, and deducting therefrom the proper valuation of the machinery, and apportioning the gross earnings according to these amounts? *If so, how shall this value be fixed and by whom? The act furnishes no answer.*"

Accordingly, we ask here, upon what receipts are we to pay? How is the proper proportion of the receipts that are attributable to the capital invested in the business to be ascertained? How shall we determine what proportion of the receipts is due to skill of management, labor, etc.? The ordinance furnishes no answer.

But the ambiguity just discussed is not the only ambiguity in the ordinance. By the express terms of the ordinance there is to be deducted from receipts (derived from the investment of capital in the business engaged in) "the receipts or proceeds from the *use* or sale of real property."

Now, as alleged in the complaint and admitted by the demurrer, no telephone or telegraph business, and particularly no telephone business, can be conducted without the use of central office equipment. No telephone service of any kind can be rendered without the use of such equipment. This equipment must be housed in buildings, and the buildings attached to land. The amended complaint alleges that there are eleven central office buildings in Seattle, housing this central office equipment, and that the appellant owns the lands and buildings housing ten of these units of central office equipment. But, according to the definition of gross income in the ordinance, the appellant is to *deduct* from its receipts such receipts or proceeds as arise *from the use of real property.* But it is plain and obvious that the appellant could not take in a dollar without the use of real property.

What, therefore, is the amount that the appellant is to deduct by reason of the use of this real property? Is it the whole amount of its receipts? If so, this ordinance has no application to the appellant. But if the appellant is to deduct annually such percentage of its receipts as arise from the use of real property, how is such percentage to be determined? Is the appellant to take the total reproduction value of all the company's property in the city and find

what percentage the present value of the land and buildings bears to that total, and use that percentage? Or is it to derive the percentage in some other fashion? How, in short, is the appellant to determine this percentage? "Shall it be by valuing the entire plant, and deducting therefrom the proper valuation [of the real estate], and apportioning the gross earnings according to these amounts? If so, how shall this value be fixed and by whom? The act furnishes no answer." (146 Mo. 155)

And on what basis is the entire plant and the real estate to be valued in order to determine the percentage relation between these two items of property? Are they to be valued on cost, or cost of reproduction, or cost of reproduction less depreciation, or fair value, or by some other method? The ordinance furnishes no answer.

Moreover, the appellant is engaged in furnishing intrastate telephone toll service. In order to furnish that service to Seattle patrons, the appellant must and does own central office equipment housed in buildings located on land situated in the various cities and towns in the State of Washington in which the appellant operates.

Now we assumed in the court below, and we assume here, for the sake of argument, that the receipts from such intrastate business are susceptible of taxation by the City. But under the definition of gross income in this case there must be deducted from all the receipts the receipts from the use of real property. Again we ask, who is to determine the percentage of receipts derived from the use of real

property located in the various cities and towns in the state? Obviously more real property is used in the transmission of an intrastate toll message than is used in the furnishing of exchange service, because not only is such real property used in the city from which the message is transmitted but also real property is used and necessarily used in the city to which the message is transmitted. The cost of real property used by the appellant in each of these cities differs. So likewise does the present value. The percentage of receipts derived from the use of real property of the appellant in the transmission of a toll message from Seattle to Tacoma will differ from the percentage in the case of a Seattle-Walla Walla or a Seattle-Vancouver message or in the case of messages from Seattle to any of the other ninety-five cities or towns in the State of Washington in which appellant operates.

Again, by virtue of its public obligation to serve adequately all persons who apply for service, the cost and the value of the appellant's plant changes almost from hour to hour. The value even of real estate at times fluctuates rapidly.

Therefore, on any basis, cost, reproduction, fair value, et al., which might be adopted—and the ordinance furnishes not even a hint for the employment of any particular basis—the percentage relation between real estate and the remaining property of the appellant would change almost daily. How can such a taxing act be administered?

In the case of *State ex rel. Crow, Atty. Genl. v. West Side Street Ry. Co.*, 146 Mo. 155, hereinbefore

cited, the statute not only provided that a street franchise should be sold to the bidder who would give the largest percentage yearly of the gross receipts derived from the use and occupation of the streets, but also that such percentage was to be increased "for each period of five years" to correspond with the increase in the value of the land thus occupied and used. Of this last provision, the Supreme Court of Missouri said:

> "Again, the percentage is to be increased in 'each period of five years' 'to correspond with the increase in the value of the land thus occupied and used.' But the act gives no *intimation* by whom or in what manner this increase is to be settled and determined. There is *painful obscurity*, too, as to what is meant by the 'increase in value of the land thus occupied and used.' Some of the counsel for the state say that the proviso should be rejected in toto, as inapplicable to street railways, where the streets only are so occupied. The act, however, declares that the same rule shall govern the disposition of all the franchises mentioned therein. It was certainly designed to increase the percentage 'as the years go by,' where street railways are concerned, fully as much as in other cases. There is nothing to indicate that any special favors are to be accorded them. Then the act has to do almost entirely with franchises which involve the use of the streets only, and in which simply that privilege will be asked. If the requirement for an increased payment for the franchise, after five

years, is meaningless in those cases, the proviso is practically eliminated. . . . Counsel say that instances may arise wherein a street railway company, in addition to the occupation of the streets with its tracks, may also desire for some of its purposes the possession of land belonging to the municipality, and there the proviso can be made effective. This construction would bring up an additional difficulty. *There is no possible method by which the gross receipts derived from the use and occupation of the lot of ground can be ascertained, and the act makes no provision for doing so.* Other counsel for the state contend that 'land,' as here used, refers to the franchise granted, and that the per cent of gross earnings to be paid for the same, under this proviso, must be increased every five years, in proportion to the increase in the value of said franchise, as shown by the gross receipts derived therefrom. It is argued, upon the other hand, that this cannot have been the intention, for the city at the original per cent will receive its due share of any increase in the earnings. Counsel upon the same side of the controversy have been unable to agree as to the proper construction to be adopted. It will be thus seen that it cannot be stated with *any degree of certainty* what meaning should be ascribed to this part of the act. No bidder can know what he will have to pay under it. No municipal officer, when called upon to accept or reject a bid, can say what the city will receive by virtue of it.

"It will be also noticed that the increase in the percentage is to be made for each period of five years in proportion to the increase in the value of the land. Between what years shall the comparison be made? Must it be the last year of the first period with the first year of the next, or the first year of the first term with the last year of that which follows? Or shall no rent be paid until the average valuation of one period of five years can be compared with the average of another, and in that way the ratio of increase be reached? Who shall say what years shall be selected for the purpose of comparison? The act gives us no data upon which to predicate a reply to these questions. These are matters which are not provided for therein, and without which the act cannot be carried into practical effect. *The courts cannot aid the defective phrasing of an act; we cannot add and mend, and by construction make up deficiencies which are left there.*' This *attempt* at legislation is so *indefinite* and *uncertain*, by reason of the effort to regulate the disposition of a great number of franchises by one general rule, that we must hold it incapable of practical operation and enforcement. Its *provisions are so obscure* that it is *impossible* to *ascertain and declare their proper meaning*. 'If the terms in which a statute is couched be so vague as to convey no definite meaning to those whose duty it is to execute it ministerially or judicially, it is necessarily inoperative'."

No further elaboration of the proposition that the ordinance is vague, indefinite and impossible of execution is, we think, necessary.

The applicable legal rule as to enactments of the character of the challenged ordinance is well stated by Judge Marshall, writing the opinion of the court in *State ex rel. Husting v. State Board of Canvassers*, 159 Wis. 216. He said:

> "If the enactment is so uncertain that the court is unable to determine, with any reasonable degree of certainty, what the legislature intended, or it is so incomplete that it cannot be executed, there is no other course open but to condemn it as void for uncertainty, as this court has done on other occasions, and other courts have done so often that the duty in that regard has become a matter of unwritten law."

Out of the host of cases decided by state courts holding statutes void for indefiniteness, we instance only a few and quote below, in each of the cases referred to, the words which, because they were vague and indefinite, rendered the statutes in the respective cases void.

Mayhew v. Nelson, 346 Ill. 381.
"Prevailing rate of wages."

Railroad Commission v. Grand Trunk Western R. Co., 179 Ind. 255.
"Approved block system."

Louisville & N. R. Co. v. Commonwealth, 99 Ky. 132.
"Just and reasonable toll."

Ex parte Lucas, 161 Ark. 180.
"Most centrally situated."

People v. Pace, 73 Cal. App. 548.
"Repeated and successive transactions."

State v. International & G. N. Ry. Co., 165 S. W. 892.
"Light repairs."

Edwards v. Browne Coal Co., 213 Iowa, 1027.
"Safe and proper manner."

State v. Powles, 90 Wash. 112.
"Principal part of a business."

C. B. & Q. R. R. Co. v. People, 77 Ill. 443.
"Unreasonable and extortionate rate."

Ex parte Schmolke, 199 Cal. 42.
"Usual transfer delivery zone."

State v. Parker, 183 Minn. 588.
"On the same lot."

International & G. N. R. R. Co. v. Mallard, 277 S. W. 1051.
"Obscure view of a railroad crossing."

Abbott v. Andrews, 45 S. W. (2d) 568.
"Vehicle moving slowly."

This court itself in a number of cases has announced that an enactment, containing a penalty, exacting obedience to a rule or standard which is so vague and indefinite as really to be no rule or standard at all, is wholly void.

In *Connally v. General Construction Co.*, 269 U. S. 385, this court held void, on the ground of indefinite-

ness, an act of the Oklahoma legislature which provided that any contractor entering into a contract with the state should pay to his employees "not less than the current rate of per diem wages in the locality where the work" was to be performed. It is said in the opinion in that case that

> "a statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

In *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U. S. 210, the Refining Company brought a suit to enjoin the Commission and the Attorney General from enforcing certain provisions of an Act of Oklahoma passed in 1915, which prohibited the production of crude oil or petroleum in the State of Oklahoma in such manner and under such conditions as to constitute waste. "Waste" was defined in the act to include "in addition to its ordinary meaning, economic waste, under ground waste, surface waste, and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands." The court held that the provision of the act relative to waste was so vague and indefinite as to render the act inoperative and void, saying (p. 568):

> "The general expressions employed here are not known to the common law or shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the oper-

ation of oil wells to apply them with any reasonable degree of certainty. The meaning of the word 'waste' necessarily depends upon many factors subject to frequent changes. No act or definite course of conduct is specified as controlling, and, upon the trial of one charged with committing waste in violation of the act, the court could not foresee or prescribe the scope of the inquiry that reasonably might have a bearing or be necessary in determining whether in fact there had been waste. It is no more definite than would be a mere command that wells shall not be operated in any way that is detrimental to the public interest in respect of the production of crude oil. And the ascertainment of the facts necessary for the application of the rule of proportionate production laid down in section 4 would require regular gauging of all producing wells in each field; a work far beyond anything that reasonably may be required of a producer in order to determine whether in the operation of his wells he is committing an offense against the act.

"In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all. *United States v. L. Cohen*

Grocery, 255 U. S. 81, 89, 41 S. Ct. 298, 65 L. ed. 516, 14 A. L. R. 1045; *Small Co. v. Am. Sugar Ref. Co.*, 267 U. S. 233, 239, 45 S. Ct. 295, 69 L. ed. 589; *Connally v. General Construction Co.*, *supra*; *Cline v. Frink Dairy Co.*, 274 U. S. 445, 454, 47 S. Ct. 681, 71 L. ed. 1146; *Smith v. Cahoon*, 283 U. S. 553, 564, 51 S. Ct. 582, 75 L. ed. 1264."

In addition to the cases cited in the foregoing quotation, see, also:

International Harvester Co. v. Kentucky, 234 U. S. 216, 222;

Collins v. Kentucky, 234 U. S. 634, 638;

Yu Cong Eng v. Trinidad, 271 U. S. 500, 517.

The ordinance in the case at bar is a penal ordinance. It provides that each day's violation of the ordinance constitutes a separate offense, and each offense may be punished by a fine up to $300, or by imprisonment in the city jail for a term of ninety days, or by both such fine and imprisonment. But even if the ordinance contained no penal provision at all, nevertheless the vagueness and indefiniteness of the definition of gross income would constitute a denial of due process of law.

In *Small Co. v. American Sugar Refining Co.*, 267 U. S. at p. 239, Justice Van Devanter, rendering the opinion of the court, said:

"The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedi-

ence to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases. They have been so construed and applied by other courts in civil proceedings."

Now, if the doctrine therein announced is applicable in any civil case, *a fortiori* it must be applicable in a taxing case, because, as said by the Supreme Court of Texas:

"It is of the utmost importance for the protection of the taxpayer that tax laws should be certain both as to the thing taxed and as to the amount of the tax and the manner of its ascertainment, that the taxpayer may have an opportunity, without the expense of litigation, to pay such taxes as he may owe, and a tax law which does not accomplish this purpose ought to be held invalid, . . ." (62 Tex. 635)

Moreover, the general rule as to the application or construction of all taxing statutes is pithily expressed by Lord Fitzgibbons, L. J., in *In re Finance Act*, 1894, and *Studdert* (1900) 2 I. R. 400, 410, C. A.:

"The benefit of the doubt is the right of the subject."

This ordinance also offends another general rule of universal application, that legislative acts affecting the liberty or property of a citizen "ought to be plainly, and clearly, and not cunningly and darkly penned," a doctrine neither novel (Coke's 4th Inst.

p. 42) nor outworn (*Connally v. General Construction Co.*, 269 U. S. 385).

The Supreme Court of Washington attempted to answer the precise argument herein made, in three ways. It said, first:

> "The definition of 'Gross Income,' contained in the ordinance, is substantially the same as that contained in the act of West Virginia, considered in the case of *Hope Natural Gas Co. v. Hall, State Tax Commissioner*, 274 U. S. 284. The tax challenged in that case was sustained."

But the act of West Virginia contained no provision for the deduction from receipts of the receipts derived from the use of real property. The definitions in the statute of West Virginia and in the Seattle ordinance are therefore not the same. Wholly irrespective of that, however, the point herein made was not made in the *Hope Natural Gas Co.* case at all. That being true, how can the decision of this court in that case have any bearing whatsoever here? Surely an opinion is not a decision on a point neither raised, suggested, mentioned nor discussed.

Cohens v. Virginia, 6 Wheat. 264, 399;
Union Tank Line Co. v. Wright, 249 U. S. 275, 286;
Continental Mutual Savings Bank v. Elliott, 166 Wash. 283, 300.

The next proposition announced by the Supreme Court of Washington that "It would be practically impossible to define 'Gross Income' so that more or less pertinent objections could not be aimed at the definition," is not correct.

There are innumerable statutes imposing taxes on gross receipts, and legislative bodies enacting such statutes have not found it necessary to employ the verbiage found in the Seattle ordinance.

Furthermore, it would seem indisputable that if *pertinent legal objections* can be made to a definition, the definition is invalid.

The third reason given by the court below for holding the definition plain and unambiguous was that "under present day systems of accounting," appellant could ascertain the amount of the tax. But surely it is not the function of accountants to determine questions of law, to construe vague and indefinite statutes, or to rule on constitutional rights. The statement of the court is tantamount to a declaration that under present day systems of accounting indefinite statutes are rendered definite, and invalid statutes are rendered valid.

Moreover, how can some accountant determine how much of the appellant's receipts are derived from the skill of its managers and the labor of its employes, as distinguished from the investment of capital? What would be the method of an accountant for appraising these different factors which enter into the production of receipts?

Again, if the Supreme Court of Missouri was unable even to think of any method by which the proportion of the street railway company's receipts derived from the use of the streets could be determined, how can some accountant determine how much of the appellant's receipts are derived from the use of its

real property in Seattle and the other 95 cities and towns in the state in which it operates.

For the reasons herein stated, the judgment of the Supreme Court of the State of Washington should be reversed.

Respectfully submitted,

OTTO B. RUPP,
ALFRED SUTRO,
Attorneys for Appellant.

McMICKEN, RAMSEY, RUPP & SCHWEPPE,
PILLSBURY, MADISON & SUTRO,
Of Counsel.

APPENDIX

ORDINANCE No. 62662
(Council Bill 53240)

AN ORDINANCE relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. *Exercise of Revenue License Power*: The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue:

Section 2. *Definitions*: In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied:

Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

Person or Persons: Persons of either sex, firms, co-partnerships, corporations and other associations of natural persons, whether acting by themselves or by servants, agents or employes.

Taxpayer: Any person liable to the license fee or tax imposed by this ordinance.

Tax Year or Taxable Year: The year commencing March 1st and ending on the last day of February of the following year, or, in lieu thereof, the taxpayer's fiscal year when permission is obtained from the City Comptroller to use the same as the tax period.

Section 3. *"Occupation License" Required*: After the 1st day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an "Occupation License."

Any person engaging in, or carrying on, more than one such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in, or carries on, any business subject to tax hereunder without having his "Occupation License" so to do, shall be guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

Section 4. *License Tax Year*: All "Occupation

Licenses" shall be for the tax year for which issued and shall expire at the end of such tax year.

Such "Occupation License" and the fee or tax therefor hereby imposed shall be for the year commencing March 1st and ending on the last day of February of the following year; Provided, however, that if the taxpayer in transacting his business keeps the books reflecting the same for a fiscal year not based on the calendar year, he may, with the assent of the City Comptroller, obtain his license for the period of his current fiscal year which shall be deemed his tax year, and pay the fee or tax computed upon his gross income made during his fiscal year (next preceding his tax year) covering his accounting period as shown by the method of keeping the books of the business.

Section 5. *Occupations Subject to Tax—Amount*: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income, as follows:

(a) Upon every person engaged in or carrying on a telegraph and/or telephone business, a fee or tax equal to four per cent (4%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

(b) Upon every person engaged in or carrying on the business of selling or furnishing gas and/or water

for hire, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

(c) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year.

(d) Upon every person conducting or engaged in the business of supplying steam heat or power to the public for hire, a fee or tax equal to four per cent (4%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Fifty ($50.00) Dollars per tax year.

(e) Upon every person engaged in the business of operating or conducting a fire alarm system, district telegraph or burglary and police alarm system for hire, a fee or tax equal to two per cent (2%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Hundred ($100.00) Dollars per tax year.

Section 6. *City of Seattle Subject to Tax*: Sub-

divisions (b) and (c) of Section 5 shall, as far as permitted by law, be applicable to the City of Seattle, except that said City shall not, as a taxpayer, be required to conform to the other provisions of this ordinance.

Section 7. *Occupations and Privileges Subject to Tax Amount*: There are hereby levied, and shall be collected, annual license fees or occupation taxes against the persons on account of the business activities or privileges and in the amounts hereinafter fixed, as follows:

(a) Upon every person engaged in or carrying on the business of operating any motor vehicle for the transportation of passengers for hire at rates per trip or based on the distance and/or time employed, and driven by the owner or his representative under the routing or direction of the passenger or person hiring the same, the following tax or fee:

When such vehicle does not stand in or upon any public street, alley or other public place, or upon any place open to the public for the use of vehicles while awaiting employment:

For each such vehicle having a seating capacity of seven (7) persons, or less, Fifteen ($15.00) Dollars per tax year;

For each such vehicle having a seating capacity of eight (8) to ten (10) persons, inclusive, Twenty ($20.00) Dollars per tax year;

For each such vehicle having a seating capacity of eleven (11) to fifteen (15) persons, inclusive, Thirty-six ($36.00) Dollars per tax year;

For each such vehicle having a seating capacity of

sixteen (16) to twenty (20) persons, inclusive, Fifty-four ($54.00) Dollars per tax year;

For each such vehicle having a seating capacity of more than twenty (20) persons, Seventy-two ($72.00) Dollars per tax year.

When such vehicle stands in or upon any public street, alley or other public place, or any place open to the public for the use of vehicles while awaiting employment:

For each such vehicle having a seating capacity of seven (7) persons, or less, Thirty ($30.00) Dollars per tax year;

For each such vehicle having a seating capacity of eight (8) to ten (10) persons, inclusive, Thirty-six ($36.00) Dollars per tax year;

For each such vehicle having a seating capacity of eleven (11) to fifteen (15) persons, inclusive, forty ($40.00) Dollars per tax year;

For each such vehicle having a seating capacity of sixteen (16) to twenty (20) persons, inclusive, Fifty-four ($54.00) Dollars per tax year;

For each such vehicle having a seating capacity of more than twenty (20) persons, inclusive, Seventy-two ($72.00) Dollars per tax year.

In determining the seating capacity of any such vehicle the driver and conductor shall be included.

(b) Upon every person engaged in or carrying on the business of operating any motor vehicle over the public streets for the purpose of sight-seeing or showing points of interest, and not elsewhere herein mentioned and licensed, a fee or tax in the same amount

as required for the business of operating the vehicle mentioned in Sub-Section (a) of this section, provided, however, that the vehicles mentioned in this subsection may be operated by the licensee at rates based on time employed, whether for sight-seeing purposes or not (known as "for hire" service) without securing in addition the license required by said Sub-Section (a).

In determining the seating capacity of any such sight-seeing vehicle the driver and announcer shall be included.

(c) Upon every person engaged in or carrying on the business of operating any motor vehicle over the public streets for the transportation of passengers for hire between common carrier passenger terminals or depots and hotels, and not elsewhere herein mentioned and licensed, for each vehicle Sixty ($60.00) Dollars per tax year.

(d) Upon every person engaged in or carrying on the business of letting the use of any motor vehicle at rates per trip, or based on distance travelled, or time employed, and to be driven and routed or directed by the person or persons hiring or renting the same, the following tax or fee:

For each such vehicle which does not stand in or upon any public street, alley or other public place, or any place open to the public for the use of vehicles while awaiting employment, Fifteen ($15.00) Dollars per tax year;

For each such vehicle standing in or upon any public street, alley or other public place, or any place open to the use of the public for vehicles while await-

ing employment, Thirty ($30.00) Dollars per tax year.

(e) Upon every person engaged in or carrying on the business of operating any vehicle drawn by or attached to any motor driven vehicle and used for the transportation of baggage, express, freight, household goods, merchandise or materials for hire, and which vehicle receives or discharges baggage, express, freight, household goods, merchandise or other materials at points within or without the City, and which does not operate over a defined route:

Each such vehicle of not more than 1 ton capacity, $3.00 per tax year.

Each such vehicle of not more than 2 tons capacity, $6.00 per tax year.

Each such vehicle of not more than 3 tons capacity, $9.00 per tax year.

Each such vehicle of not more than 4 tons capacity, $12.00 per tax year.

Each such vehicle of not more than 5 tons capacity, $15.00 per tax year.

Each such vehicle of not more than 6 tons capacity, $18.00 per tax year.

Each such vehicle of more than 6 tons capacity, $21.00 per tax year.

No license required by this ordinance for the operation of any vehicle shall be issued unless the licenses and/or permits therefor required by law or ordinances other than this have been granted.

Section 8. *Tax Apportioned for Year 1932*: For the remainder of the tax year 1932, ending on the last day of February, 1933, the fees or taxes herein

imposed shall be apportioned in the ratio of said remainder to a full tax year.

Section 9. *Exceptions and Deductions*: There shall be excepted and deducted from the total gross income upon which the license fee or tax is computed so much thereof as is derived from transactions in interstate or foreign commerce, or from business done for the government of the United States, its officers or agents, and any amount paid by the taxpayer to the United States, the State of Washington, or the City of Seattle, as excise taxes levied or imposed upon the sale or distribution of property or services.

Nothing in this ordinance shall be construed as requiring a license, or the payment of a license fee or tax, or the doing of any act, which would constitute an unlawful burden or interference in violation of the Constitution or laws of the United States, or which would not be consistent with the Constitution or laws of the State of Washington.

Any person subject to the payment of a license fee or tax under the provisions of any ordinance of the City, other than this, on account of engaging in any activity for which he is liable to tax hereunder, may deduct the amount of such fee or tax from the amount of fee or tax imposed by this ordinance on account of such activity, but such person shall nevertheless, in the manner herein provided for, apply for and procure an "Occupation License."

Section 10. *Application or Return for License*: On or before the 1st day of July, 1932, and thereafter on or before the first day of each tax year, every taxpayer shall apply to the City Comptroller for an "Oc-

cupation License" upon blanks or forms of return to be prepared and provided by him requesting such information as may be necessary to enable him to arrive at the lawful amount of the fee or tax. The taxpayer shall, in a legible manner, write in such blank or form of return the information required and shall sign the same and by affidavit at the foot thereof shall swear or affirm that the information therein given is full and true and that he knows the same to be so.

Every such application or return shall be accompanied by a remittance by bank draft, certified check, cashier's check or money order, payable to the City Treasurer, or in cash, in the amount of the tax or fee or installment thereof required by the provisions hereof.

If the applicant be a partnership, the application or return must be made by one of the partners; if a corporation, by one of the officers thereof; if a foreign corporation, co-partnership or non-resident individual, by the resident agent or local manager of said corporation, co-partnership or individual.

Section 11. *Monthly and Quarterly Payment of Tax:* Where the amount of the license fee or tax is based upon gross income, the taxpayer may pay his fee or tax in equal monthly installments during the life of his license, each such installment to be paid on or before the 10th day of the month. In all other cases the taxpayer may pay his fee or tax in equal installments during the life of his license, each such installment to be paid on or before the 1st day of March, the 1st day of June, the 1st day of September and the 1st day of December, respectively.

Section 12. *When Tax Based on Current Year—Commencement of Business During Tax Year*: Where a business, occupation or pursuit subject to tax upon gross income has not been carried on for the full calendar or fiscal year next preceding the tax year for which license is required, the license fee or tax shall be paid monthly in installments during the life of the license on or before the 10th day of the month, and shall be based upon the gross income for the month next preceding that in which payment is due. In such cases the taxpayer shall make monthly returns similar to the annual returns provided for herein on or before the 10th day of the month, under oath or affirmation covering the business of the previous month.

In all other cases where a person commences during any tax year to engage in any business, occupation, pursuit or privilege, he shall be entitled to a license for the remainder of such tax year for the required fee apportioned in the ratio of said remainder to a full tax year.

Section 13. *Monthly payments—License Prerequisite*: In any case where the taxpayer pays his license fee or tax monthly he shall nevertheless first procure his "Occupation License" in the manner herein required before commencing or continuing in business, and shall pay the minimum fee or tax therefor, which shall be credited against future installments.

Section 14. *Sale or Transfer of Business*: Upon the sale or transfer during any tax year of a business on account of which a fee or tax is hereby required, the purchaser or transferee shall, if the fee or tax

has not been paid in full for said year, be responsible for its payment for that portion of said year during which he carries on such business.

Section 15. *Taxpayer to Keep Books and Records —Returns Confidential*: It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the City Comptroller, pursuant to this ordinance, shall not be made public, nor shall they be subject to the inspection of any person except the Mayor, the Corporation Counsel, the City Comptroller, or his authorized agent, and members of the City Council.

Section 16. *Comptroller to Investigate Returns*: If any taxpayer fails to apply for license or make his return, or if the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements, as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place for an investigation of the

correctness of the return and may issue a subpoena to the taxpayer, or any other person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpoena, require him, or any person, to bring with him such books, records and papers as may be necessary.

Section 17. *Over or Underpayment of Tax*: If the City Comptroller upon investigation or upon checking returns finds that the fee or tax paid or any of them is more than the amount required of the taxpayer, he shall refund the amount overpaid by a warrant upon the General Fund. If the City Comptroller finds that the fee or tax paid is less than required, he shall send a statement to the taxpayer showing the balance due, who shall within three (3) days pay the amount shown thereon.

Section 18. *Remedy for Non-payment of Tax*: If any taxpayer fails to apply for license, or make his return, or to pay the fee or tax therefor, or any part thereof, within three (3) days after the same shall have become due, the City Comptroller shall ascertain the amount of the fee or tax or installment thereof due and shall notify such taxpayer thereof, who shall be liable therefor in any suit or action by the City for the collection thereof. The City Comptroller shall also notify the Corporation Counsel in writing of the name of such delinquent taxpayer and the amount due from him and said officer shall, with the assistance of the City Comptroller, collect the same by any appropriate means or by suit or action in the name of the City.

Section 19. *Appeals to City Council*: Any taxpayer aggrieved by the amount of the fee or tax found by the City Comptroller to be required under the provisions of this ordinance, may appeal to the City Council from such finding by filing a written notice of appeal with the City Clerk within five (5) days from the time such taxpayer was given notice of such amount. The Clerk shall, as soon as practicable, fix a time and place for the hearing of such appeal, which time shall be not more than ten (10) days after the filing of the notice of appeal, and he shall cause a notice of the time and place thereof to be delivered or mailed to the appellant. At such hearing, the taxpayer shall be entitled to be heard and to introduce evidence in his own behalf. The City Council shall thereupon ascertain the correct amount of the fee or tax by resolution and the City Clerk shall immediately notify the appellant thereof, which amount, together with costs of the appeal, if appellant is unsuccessful therein, must be paid within three (3) days after such notice is given.

The President of the City Council, or the Chairman of any committee thereof before which the appeal is to be heard, may, by subpoena, require the attendance thereat of any person, and may also require him to produce any pertinent books and records. Any person served with such subpoena shall appear at the time and place therein stated and produce the books and records required, if any, and shall testify truthfully under oath administered by the Chairman in charge of the hearing on appeal as to any matter required

of him pertinent to the appeal, and it shall be unlawful for him to fail or refuse so to do.

Section 20. *Comptroller to Make Rules*: The City Comptroller shall have the power, and it shall be his duty, from time to time, to adopt, publish and enforce rules and regulations not inconsistent with this ordinance or with law for the purpose of carrying out the provisions thereof, and it shall be unlawful to violate or fail to comply with, any such rule or regulation.

Section 21. *Licenses—Posting—Unlawful Use Of*: All licenses issued pursuant to the provisions of this ordinance shall be kept posted by the licensee in a conspicuous place in his principal place of business in the City, except that all licenses for the operation of a vehicle shall be attached in a conspicuous place upon the right hand side of such vehicle in a suitable holder to be furnished by the City Comptroller upon the payment of a fee of Twenty-five ($.25) Cents.

No person to whom a license has been issued, pursuant to this ordinance, shall suffer or allow any other person chargeable with a separate license to operate under or display his license, nor shall such other person operate under or display such license.

Section 22. *False Returns, etc.*: It shall be unlawful for any person liable to tax hereunder to fail or refuse to make application or return for a license or to pay the fee or tax or installment thereof when due, or for any person to make any false or fraudulent application or return or any false statement or representation in, or in connection with, any such application or return, or to aid or abet another in any at-

tempt to evade payment of the fee or tax, or any part thereof, or for any person to fail to appear and/or testify in response to subpoena issued pursuant hereto, or to testify falsely upon any investigation of the correctness of a return, or upon the hearing of any appeal, or in any manner to hinder or delay the City or any of its officers in carrying out the provisions of this ordinance.

Section 23. *Effect of Partial Invalidity*: If any provision or section of this ordinance shall be held void or unconstitutional, all other parts, provisions and sections of this ordinance not expressly so held to be void or unconstitutional shall continue in full force and effect.

Section 24. *Penalty*: Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the City Jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 25. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed the City Council the 23rd day of May, 1932,

and signed by me in open session in authentication of its passage this 23rd day of May, 1932.

JAMES SCAVATTO,
President Pro Tem of the City Council.

Approved by me this 25th day of May, 1932.

PHILIP TINDALL,
Acting Mayor.

Filed by me this 25th day of May, 1932.

Attest: H. W. CARROLL,
City Comptroller and Ex-Officio City Clerk.
(Seal) By E. M. STREET,
Deputy Clerk.

Published May 31, 1932.

H. W. CARROLL,
City Comptroller and Ex-Officio City Clerk.
By E. M. STREET,
Deputy Clerk.

No. 364

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Appellant,

VS.

THE CITY OF SEATTLE, a municipal corporation, and HARRY W. CARROLL, as Comptroller of the City of Seattle,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

A. C. VAN SOELEN,
Corporation Counsel,
WALTER L. BAUMGARTNER,
Assistant,
C. V. HOARD,
Counsel for Appellees.
515 County-City Building, Seattle, Washington.

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SUBJECT INDEX

The Question for Review 1
Summary of Argument 1
Argument 3
Applicable Provisions of Ordinance No. 62662 .. 3
Appellant's Criticisms Stated 5
Rules of Construction 6
A. The Word "Value" Means Gross Receipts .. 11
B. Since Appellant's Gross Receipts are Otherwise Covered in the Definition, it May not be Heard to Complain of the Phrase "Receipts by Reason of the Investment of Capital." The Phrase is not Indefinite 18
C. Since all of Appellant's Receipts Accrue from the Sale of its Service, it Obtains no Receipts from the Use, as Such, of its Real Property .. 20
D. The Penalty Provisions Apply Only to Intentional Wrong 24
General Observations 26
Conclusion 28

TABLE OF CASES CITED

Adams v. Greene, 182 Ky. 504, 206 S. W. 759 10
Alaska Mex. Gold Min. Co. v. Terr. of Alaska (C. C. A.) 236 Fed. 64 11
Austin v. U. S., 155 U. S. 417, 39 L. ed. 206 17
Choctaw, O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234 17
Cliquot v. U. S., 3 Wall. (70 U. S.) 114, 18 L. ed. 116 11
Coggins v. Ely, 23 Ariz. 155, 202 Pac. 391 10
Darnell v. Indiana, 226 U. S. 390, 57 L. ed. 267 9
Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128 8
Fox v. Washington, 236 U. S. 273, 59 L. ed. 573 ..... 8, 10, 27

Gould v. Gould, 245 U.S. 151, 62 L. ed. 211 6
Hamilton v. Rathbone, 175 U. S. 414, 44 L. ed. 219 7
Hooper v. California (1895) 155 U. S. 648, 39 L. ed. 297 6
Hope Natural Gas Co. v. Hall, 102 W. Va. 272, 274 U. S. 284 5
Hygrade Prov. Co. v. Sherman, 266 U. S. 497, 69 L. ed. 402 27
Int. Harv. Co. v. Ky., 234 U. S. 216, 58 L. ed. 1284 13
Johnson v. So. Pac. Co., 196 U. S. 1, 49 L. ed. 363 .. 11
Lynch v. Hornby, 247 U. S. 339, 62 L. ed. 1149 6
McKinley Telephone Co. v. Cumberland Telephone Co., 152 Wis. 359, 140 N. W. 38 12
Magoon v. Eastman, 86 Vt. 261, 84 Atl. 869 18
Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294 ..... 23, 25
Metropole Construction Co. v. Hartigan, 83 N. J. L. 409, 85 Atl. 313 18
Miller v. Strahl, 239 U. S. 426, 60 L. ed. 364 26
Nash v. U. S., 229 U. S. 373, 57 L. ed. 1232 26
New York C. & H. R. R. Co. v. U. S., 212 U. S. 481, 53 L. ed. 613 9
Northern Cedar Co. v. French, 131 Wash. 394, 230 Pac. 837 24
Northwestern Mut. Life Ins. Co. v. Lewis & Clark County, 28 Mont. 484, 72 Pac. 982 ..... 24, 26
Omaechevarria v. Idaho, 246 U. S. 343, 62 L. ed. 763 26
Pacific Coast Dairy v. Police Ct. of San Francisco, 214 Cal. 668, 8 Pac. (2d) 140, 80 A. L. R. 1217 10
Pacific Company v. Johnson, 285 U. S. 480, 76 L. ed. 893 7
Peabody v. Eisner, 247 U. S. 347, 62 L. ed. 1152 6
People v. Gaus, 199 N. Y. 147, 92 N. E. 230 20
People v. Saxe, 165 N. Y. S. 938 20
People v. Sohmer, 147 N. Y. S. 726 20
People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N. Y. 48, 129 N. E. 202 ..... 24, 25

Plymouth Coal Co. v. Pa., 232 U. S. 531, 58 L. ed 713 ..... 8, 25
Postal Tel.-Cable Co. v. Tonopah & T. R. Co., 248 U. S. 471, 63 L. ed. 365 12
Rosenthall v. People, 226 U. S. 260, 57 L. ed. 212 8
Royall v. Virginia, 116 U. S. 572, 29 L. ed. 735 11
Southeastern Exp. Co. v. Miller, 264 U. S. 535, 68 L. ed. 836 10
Southeastern Exp. Co. v. Nightingale, 33 Ga. 515, 126 S. E. 915 13
So. Pac. Co. v. Lowe, 247 U. S. 330, 62 L. ed. 1142 6
Southern R. Co. v. King, 217 U. S. 524, 54 L. ed. 868 8
Standard Stock Food Co. v. Wright, 225 U. S. 540, 56 L. ed. 1197 8
State v. Brown, 108 Wash. 205, 182 Pac. 944 27
State v. Case, 88 Wash. 664, 153 Pac. 1070 25
State v. Central Trust Co., 106 Md. 268, 67 Atl. 267 20
State v. Coolidge, 72 Wash. 42, 129 Pac. 1088 25
State v. Dvoracek, 140 Ia. 266, 118 N. W. 399 10
State v. Hennessy, 114 Wash. 351, 195 Pac. 211 27
State v. Livingston Concrete B. & M. Co., 34 Mont. 570, 87 Pac. 980 10
State v. Santee, 111 Ia. 1, 82 N. W. 445 24
State v. St. Louis, 241 Mo. 231, 145 S. W. 801 ..... 24, 25
State ex rel. Crow v. Westside R. Co., 146 Mo. 155, 47 S. W. 959 10
State ex rel. Forchheimer v. LeBlond, 108 Ohio St. 41, 140 N. E. 491 10
State ex rel. French v. Clausen, 107 Wash. 667, 182 Pac. 610 ..... 24, 26
The Abby Dodge, 223 U. S. 166, 56 L. ed. 390 8
Toombs v. Citizens Bank, 281 U. S. 643, 74 L. ed. 1088 ..... 7, 9
Towne v. Eisner, 245 U. S. 418, 62 L. ed. 372 ..... 6, 15
United Fuel Gas Co. v. Hallanan, 87 W. Va. 396, 257 U. S. 277 5

U. S. v. Downing & Co. (C. C. A.) 146 Fed. 56.... 17
U. S. v. Stowell, 133 U. S. 1, 33 L. ed. 555..... 11
U. S. v. Wurzbach, 280 U. S. 396, 74 L. ed. 508..... 9
Utah Pr. & Light Co. v. Pfost, 286 U. S. 165, 76 L. ed. 1038 ..... 9, 22, 23, 25, 27
Waters-Pierce Oil Co. v. Tex., 212 U. S. 86, 53 L. ed. 417 26
Williams v. Walsh, 222 U. S. 415, 56 L. ed. 253.... 9

TEXT BOOKS:

"English Synonyms Explained," George Crabb, p. 756 13
Lewis' Sutherland, Statutory Construction (2nd ed., § 420) 16

STATUTES:

Act of July 2, 1890 (26 Stat. at L. 209, Ch. 647) 26
28 Stat. at L. 209, Ch. 647..... 26
U. S. C. A., Title 26, § 954..... 6
Rem. Rev. Stat., § 10372..... 14
Rem. Rev. Stat., § 10376..... 14
Rem. Rev. Stat., § 10391..... 14
Rem. Rev. Stat., § 10443..... 14
Rem. Rev. Stat., § 10444..... 14
Washington Session Laws, 1933, Ch. 4..... 22
Washington Session Laws, 1933, Ch. 191, § 1, Subd. 6 5
Mississippi Code, 1933 Sup., p. 497..... 5
West Virginia Code, 1932, § 959..... 5

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THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Appellant*,

vs.

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No. 364

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

The question presented for determination here is whether the Supreme Court of the State of Washington erred in deciding that the term "gross income" as defined in Seattle Ordinance No. 62662 was not so vague, indefinite or uncertain as to deny appellant due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

SUMMARY OF ARGUMENT

(A) The word "value" means gross, not net, receipts arising or accruing from the sale of appellant's service treated as a commodity. The price (rates, tolls and charges fixed by law) received is the "value" received. "Value" means gross receipts since ex-

press provisions allow no deductions for cost of service.

Moreover, appellant's gross receipts are comprehended within the terms "rentals, royalties. fees or other emoluments, however designated."

(B) Since appellant's gross receipts are otherwise covered in the definition, it may not be heard to complain of the phrase "receipts by reason of the investment of capital". The phrase is not indefinite.

(C) Since all of appellant's receipts accrue from the sale of its service, it obtains no receipts from the *use* as such of its real property. Any indefiniteness in the clause "excluding receipts or proceeds from the *use* * * * of real property" is, therefore, not before the Court. If material, however, and unconstitutionally indefinite, the clause may be disregarded.

(D) The penalty provisions apply only to intentional wrong. In any event, these provisions should not render the tax provisions of the ordinance void.

(E) General Obesrvations. Exemplification of judicially approved words and phrases of more or less indefinite import.

ARGUMENT

Under the provisions of Ordinance No. 62662 of the City of Seattle appearing in the Record herein at page 14 and in the Appendix to appellant's brief, the appellant is taxed as follows:

> "Section 3. *'Occupation License' Required*: After the 1st day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an 'Occupation License'. * * *."
>
> "Section 5. *Occupations Subject to Tax—Amount*: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income, as follows:
>
> (a) Upon every person engaged in or carrying on a telegraph and/or telephone business, a fee or tax equal to four per cent. (4%) of the total gross income from such business in the City duing his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1000.00) Dollars per tax year. * * *."
>
> "Section 2. *Definitions*: In construing the provisions of this ordinance, save when other-

wise plainly declared or clearly apparent from the context, the following definitions shall be applied:

"GROSS INCOME: The value proceeding or accuring from the sale of tangible property or service, and receipts, (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses. * * *."

"Section 9. *Exceptions and Deductions*: There shall be excepted and deducted from the total gross income upon which the license fee or tax is computed so much thereof as is derived from transactions in interstate or foreign commerce, or from business done for the government of the United States, its officers or agents, and any amount paid by the taxpayer to the United States, the State of Washington, or the City of Seattle, as excise taxes levied or imposed upon the sale or distribution of property or services. * * *."

"Gross income" as above delimited was borrowed

with some change from Section 959, West Virginia Code, 1932. The act in which it appears has been in force there for several years, and has twice been before this Court.

Hope Natural Gas Co. v. Hall, 102 W. Va. 272, 274 U. S. 284 (Upholding tax on gross income of a natural gas company);
United Fuel Gas Co. v. Hallanan, 87 W. Va. 396, 257 U. S. 277.

In neither case was the definition criticized or an issue.

Substantially similar definitions appear in The Emergency Revenue Act of Mississippi, 1932 (Miss. Code, 1933 Sup., p. 497) and in the Washington Occupation Tax (Session Laws, 1933, Ch. 191, Sec. 1, Subd. (6)).

The appellant points out three parts of the definition in question which it deems so vague and meaningless as to be incapable of application with the claimed precision required by the Constitution. It asserts that (A) the word "value" in the clause "value proceeding or accruing from the sale of tangible property or service" is indefinite and vague; (B) that it is impossible to segregate "receipts by reason of the investment of capital" in its business from receipts arising from skill and management exercised in its business; and (C) that it is impossible to ascertain the amount or proportion of its "receipts or proceeds from the *use* of" its real property, located both in and out of the City, for the purpose of excluding such receipts or proceeds from its "receipts by reason of the investment of capital".

Of course, these criticisms were conceived in partisanship, destructively critical, and separated by a wide chasm from the constructive judicial approach to legislation on trial upon charges of constitutional infraction. This Court long ago said:

> "The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."
>
> *Hooper v. California* (1895) 155 U. S. 648, 657, 39 L. ed. 297, 301.

This juridical attitude is especially appropriate and proper when, as here, legislative definition is dissected for destructive ends. Any definition, concisely stated, is at best only the appoximation in expression of a concept. "Definition, simple, positive, hard and fast as it is, never tells the whole truth about a conception," says Josiah Royce. The history of the Federal income tax law is strewn with taxpayer's, departmental, and judicial efforts to ascertain the practical consequences of the Congressional definition of "gross income" appearing in that law (U. S. C. A., Title 26, §954). Among many, we refer to a few instances:

Towne v. Eisner, 245 U. S. 418, 62 L. ed. 372;

So. Pac. Co. v. Lowe, 247 U. S. 330, 62 L. ed. 1142;

Peabody v. Eisner, 247 U. S. 347, 62 L. ed. 1152;

Lynch v. Hornby, 247 U. S. 339, 62 L. ed. 1149;

Gould v. Gould, 245 U. S. 151, 62 L. ed. 211.

The definition in issue here was approved by the Washington Court without construction, conceivably because "the province of construction lies wholly within the domain of ambiguity." *Hamilton v. Rathbone*, 175 U. S. 414, 44 L. ed. 219. If, notwithstanding the Washington Court, it is thought that construction is necessary, it will be accomplished along lines previously marked out by this Court: (1) In the absence of any construction by the State Court, this Court will, if possible, construe State legislation so that it harmonizes with the Constitution, and will resolve doubts in favor of constitutionality. (2) This tribunal will not declare such legislation void at the instance of one not adversely affected. (3) A statute will not be held void for uncertainty if any practical, sensible or reasonable construction can be given it.

In the absence of applicable state decisions, this tribunal will be guided by generally accepted principles of construction which have been recognized and acted upon by it.

> *Pacific Company v. Johnson*, 285 U. S. 480, 489, 76 L. ed. 893, 896.

> (1) "If the state court has not otherwise construed it, and it is susceptible of an interpretation which conforms to constitutional requirements, doubts must be resolved in favor of, and not against, the state."
>
> *Toombs v. Citizens Bank*, 281 U. S. 643, 647, 74 L. ed. 1088, 1090.

If a statute is susceptible to two constructions, one of which will render it constitutional and the

other unconstitutional, it is the duty of the court to adopt that construction which without doing violence to the fair meaning of the language, will render it valid.

Plymouth Coal Co. v. Pa., 232 U. S. 531, 546; 58 L. ed. 713, 720;

The Abby Dodge, 223 U. S. 166, 175, 56 L. ed. 390; 393.

"So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed (*United States ex rel. Atty. Gen. v. Delaware & H. Co.*, 213 U. S. 366, 407, 408, 53 L. ed. 836, 848, 849, 29 Sup. Ct. Rep. 527); and it is to be presumed that state laws will be construed in that way by the state courts."

Fox v. Washington, 236 U. S. 273, 277, 59 L. ed. 573, 575.

(2) The constitutionality of statutes may be challenged only by one adversely affected and only to the extent to which he is so affected.

A litigant can not invoke a constitutional objection to a part of a statute not applicable to his own particular case.

Southern R. Co. v. King, 217 U. S. 524; 54 L. ed. 868;

Engel v. O'Malley, 219 U. S. 128; 55 L. ed. 128;

Standard Stock Food Co. v. Wright, 225 U. S. 540; 56 L. ed. 1197;

Rosenthall v. People, 226 U. S. 260; 57 L. ed. 212;

Darnell v. Indiana, 226 U. S. 390; 57 L. ed. 267.

Unless a litigant's rights are directly involved, the Court will postpone inquiry into constitutional questions which are separable therefrom until they are met upon a question directly at issue unless the unconstitional feature of it, if it exists, is of such a character as to render the entire act void.

New York C. & H. R. R. Co. v. U. S., 212 U. S. 481; 53 L. ed. 613.

"A law can not be declared invalid at the instance of one not affected by it."

Williams v. Walsh, 222 U. S. 415, 423, 56 L. ed. 253, 256.

The objection that a statute is too vague to be valid is available only to one whom it concerns.

U. S. v. Wurzbach, 280 U. S. 396, 74 L. ed. 508.

"In assailing the constitutionality of a state statute, the burden rests upon appellant to establish that it infringes the constitutional guaranty which he invokes."

Toombs v. Citizens Bank, supra.

"A litigant can be heard to question a statute's validity only when, and so far as, it is being, or is about to be applied to his disadvantage."

Utah Pr. & Light Co. v. Pfost, 286 U. S. 165, 186, 76 L. ed. 1038, 1049.

(3) A statute can not be held void for uncertainty if any practical or sensible or reasonable construction can be given it. Mere difficulty in ascertaining its

meaning or the fact that it is susceptible to interpretation will not render it nugatory. Mere difficulty in construction does not justify courts in disregarding it, and it is their duty to endeavor by every rule of construction to ascertain the meaning of, and give full force and effect to, every enactment of the legislature not obnoxious to constitutional prohibitions.

Fox v. Washington, 236 U. S. 273, 277, 59 L. ed. 573, 575;

State ex rel. Crow v. Westside R. Co., 146 Mo. 155, 47 S. W. 959;

Adams v. Greene, 182 Ky. 504, 206 S. W. 759;

State v. Livingston Concrete B. & M. Co., 34 Mont. 570, 87 Pac. 980;

State ex rel. Forchheimer v. LeBlond, 108 Ohio St. 41, 140 N. E. 491;

State v. Dvoracek, 140 Ia. 266, 118 N. W. 399;

Coggins v. Ely, 23 Ariz. 155, 202 Pac. 391;

Pacific Coast Dairy v. Police Ct. of San Francisco, 214 Cal. 668, 8 Pac. (2d) 140, 80 A. L. R. 1217.

Courts may resolve to clearness a vague statute imposing a tax.

Southeastern Exp. Co. v. Miller, 264 U. S. 535, 539, 68 L. ed. 836, 839.

"Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress

public wrong and promote the public good. They should be so construed as to carry out the intention of the legislature in passing them, and most effectually accomplish these objects."

Cliquot v. U. S., 3 Wall. (70 U. S.) 114, 145, 18 L. ed. 116, 121;

Royall v. Virginia, 116 U. S. 572, 583, 29 L. ed. 735, 738.

"The intention (of the legislature to tax) being plain, the inartificiality of the law should not result in its overthrow."

Alaska Mex. Gold Min. Co. v. Terr. of Alaska (C. C. A.) 236 Fed. 64, 69—citing *Johnson v. So. Pac. Co.*, 196 U. S. 1, 49 L. ed. 363; *U. S. v. Stowell*, 133 U. S. 1, 33 L. ed. 555.

(A) The Word "Value" Means Gross Receipts.

Guided as above, we turn with a constructive mind to the ordinance definition of "gross income" as applied to the appellant. It is taxed upon the pursuit in the City of a *telephone and telegraph business* and the tax is measured by its income from that business in the City. Business, as commonly understood, whether it be merchandising, transportation, manufacturing or communication, connotes the making or transferring of property, or the furnishing of service, *for money*. The appellant's business is the rendering of communication service to the public for money. Now, while it may not be strictly accurate to speak of the "sale" of "service", since "sale" in its strict application means the transfer of property for money

or the promise thereof, yet it is popularly used in connection with the word "service"—"service" treated as a commodity upon the market as wheat or iron or automobiles. Not only has service been popularly so treated but it has also been judicially so regarded. In *McKinley Telephone Co. v. Cumberland Telephone Co.*, 152 Wis. 359, 140 N. W. 38, 40, it was held:

> "The furnishing of telephone service may be classed within the general terms of the (anti-trust) statute as the supplying of a commodity constituting a subject of commerce."

In *Postal Tel.-Cable Co. v. Tonopah & T. R. Co.*, 248 U. S. 471, 474, 63 L. ed. 365, 371, in construing the terms of an Act of Congress, a proviso in which excluded from the operation of the Act contracts or agreements between communications companies and common carriers for the exchange of services between them, Mr. Justice Holmes, speaking for the court, said:

> "But 'exchange' is *barter*, and carries with it no implication of reduction to money as a common denominator." (Italics ours)

If such services may be exchanged or bartered, they may, in the same sense, be sold.

It is quite plain that the City Council of the City of Seattle treated telephone and telegraph service, as well as service in general, as a commodity. This it was privileged to do even against the dictates of strict logic.

The only portion of the definition, therefore, with which the appellant is concerned is the following abridgment:

> "The value proceeding or accruing from the sale of (telegraph and telephone) service * * * without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

So, then, its tax is measured by the "value" proceeding or accruing to it from the sale of its service.

"Value" may, and sometimes does, mean "price". Price is a synonym.

> *Southeastern Exp. Co. v. Nightingale*, 33 Ga. 515, 126 S. E. 915.

"Value" is the first meaning ascribed to the word "price" in Webster's New International Dictionary (1931). From Funk and Wagnall's New Standard Dictionary of the English Language (1925), we learn that, in political economy, value, in a restricted sense, is market price. In The New Century Dictionary (1927) we find that value is the worth of a thing, measured by the amount of other things for which it can be exchanged, or as estimated in terms of a medium of exchange. George Crabb, in his "English Synonyms Explained", page 756, says that price is the measure of the value received from a sale; it is the measure of value or worth.

Mr. Justice Holmes, in *Int. Harv. Co. v. Ky.*, 234 U. S. 216, 222, 58 L. ed. 1284, 1287, defines value thus:

> "Value is the effect in exchange of the relative social desire for compared objects expressed

in terms of a common denominator. It is a fact, and generally is more or less easy to ascertain." The "price", the "common denominator", received by the appellant is, therefore, the "value" which proceeds or accrues to it from the sale of its service. In its case the common denominator, the price, is fixed by law.

Under Rem. Rev. Stat. §10372, every telephone and telegraph company is required to file with the Washington Department of Public Works (the regulatory body) and to keep open to public inspection, "schedules showing the rates, tolls, rentals, contracts, and charges of such companies for messages, conversations and services rendered, and equipment and facilities supplied for messages and services to be performed within the State * * *."

The rates, tolls, etc. so fixed are subject to change by action of the Department upon its order after hearing upon its own motion or upon complaint (Rem. Rev. Stat., §10391). Telephone and telegraph companies are forbidden under penalty to charge, demand, collect or receive a greater or less or different compensation for any service rendered than the charge applicable to such service as specified in its schedule on file, or as changed by the Department (*Idem* §§10376, 10443, 10444).

The result is that the value proceeding or accruing to the appellant from the sale or rendition of its service is the ascertained or fixed rate or price which it receives from the subscribers. The value of its service is well defined by law.

But it is objected that the word "value" is unde-

fined and is the most intensely undefined word in the English language; that it may mean either gross receipts or net receipts; that it must mean net receipts because no value accrues to the seller of service or property except net profits. True, the word standing alone is susceptible of several meanings, but these meanings are generally resolved to one by the context or connection in which used. Mr. Justice Holmes, speaking for the Court, beautifully expressed the thought, thus:

> "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."
>
> *Towne v. Eisner*, 245 U. S. 418, 425, 62 L. ed. 372, 376.

Value's circumstance here is its use in a revenue ordinance which obviously seeks to measure the tax by so much of total receipts as may be reached. The term "gross income", itself, connotes gross receipts, not net receipts. "Value" is also used in intimate relation with the word "sale".

When a furniture dealer sells a desk for $10.00, that amount is the value which accrues to him from the sale, regardless of the cost of the desk. When he purchased the desk from the manufacturer for $5.00, he parted with that value or amount. When he sold it, he recovered the value or amount given for it, plus a *net* profit or income. "Value" in the definition obviously comprehends value only from sale, not from *purchase and sale*. And so it is with service.

Aside from this, however, the taxpayer is told in no uncertain terms by the last portion of the definition that he may make no "deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses." It seems as plain as anything can be that "value" may not be construed as net profit or net receipts.

It is suggested, however, that the phrase just quoted does not in any way modify or relate back to the first clause in the definition—that it modifies or relates only to that portion commencing with the words "receipts by reason of the investment of capital." Lewis' Sutherland, Statutory Construction (2d ed., Sec. 420) is relied upon (Br. p. 9). That authority, in the same section, after stating that "relative and qualifying words and phrases, grammatically and legally, *where no contrary intention appears*, refer solely to the last antecedent," says:

> "* * * This principle is of no great force; it is only operative when there is nothing in the statute indicating that the relative word or qualifying provision is intended to have a different effect. And very slight indication of legislative purpose or a parity of reason, or the natural and common-sense reading of the statute, may overturn it and give it a more comprehensive application. Thus, as was said by the court in *Great Western Railway Company v. Swindon*, referring to the phrase 'horses, oxen, pigs and sheep, *from whatever country they come*,' the

> last clause would apply alike to all these animals and not alone to sheep, (citing Gyger's Estate, 65 Pa. St. 311). * * * Qualifying words have been applied to several preceding sections where the nature of the provisions and the obvious sense required it."

The effect of qualifying words or provisos was not limited to the last antecedent in *Austin v. U. S.*, 155 U. S. 417, 431, 432, 39 L. ed. 206, 211, 212, and in *U. S. v. Downing & Co.* (C. C. A.) 146 Fed. 56.

What is the intent of the City Council in the use of the concluding phrase? In the first place, it appears in an occupation tax act, the kind of act in which it is usual to employ *gross* income or *gross* receipts without deductions, as the tax measure. "* * * the manifest purpose is to reach all sales and secure a certain percentage thereof, — a method commonly pursued in respect of license and occupation taxes." *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292, 299, 59 L. ed. 234, 237. In the second place, it would be farcical to restrict the first clause to *net* receipts and by the next following language include receipts, rentals, royalties, fees or other emoluments, however designated, without *any deductions*. In the third place, the phrase is introduced by the word *"and"* which is not necessary if intended to relate only to receipts from the investment of capital, rentals, etc., the next antecedent.

It should be apparent at this point that the abridgment of the definition just considered is, as applied to appellant, "plainly, and clearly, and not cunningly and darkly penned." It designates as gross income

all of appellant's receipts from the sale of telephone and telegraph service, without deductions.

Moreover, beyond so-called telephone rentals for exchange service, *emoluments* designated as "tolls" for telephone toll service, "*fees*" for telegraph messenger service, and *receipts*, compensation, or *emoluments* for transmission of telegrams, it is not shown in the complaint, nor is it a matter of common knowledge capable of judicial notice that appellant is the recipient of receipts, compensation or reward for any other service or activity. *No fault is found with the inclusion in "receipts" of "rentals, royalties, fees or other emoluments, however designated."* As here used, "rentals" includes compensation for the use of personalty, since proceeds from the use of real property are excluded. That "rentals" is thus commonly used, see *Metropole Construction Co. v. Hartigan*, 83 N. J. L. 409, 85 Atl. 313; *Magoon v. Eastman*, 86 Vt. 261, 84 Atl. 869; and Webster's New International Dictionary (1931).

(B) Since Appellant's Gross Receipts are Otherwise Covered in the Definition, it may not be Heard to Complain of the Phrase "Receipts by Reason of the Investment of Capital." The Phrase is not Indefinite.

The rule, therefore, which precludes a litigant from invoking a constitutional objection to a part of a statute not applicable to his own particular case disqualifies appellant from raising any question concerning the use of the words "and receipts * * * by reason of the investment of capital."

Should we be mistaken in this however, and assuming that the said clause is, in some way not shown, relative to the appellant, we proceed with the discussion thereof. It serves the purposes of an omnibus and carries in its embrace all forms of receipts not otherwise mentioned or covered and, to that extent, is a second factor in gross income. It is not applicable, however, to all lines of business, such, for example, as obtain receipts only from sales. It is asserted that receipts are not obtained solely by reason of the investment of capital in the business but that receipts are the result, both of the investment of capital and of management, skill and labor, and that it is impossible to determine the relative amounts of the receipts obtained from each factor.

Capital is invested not only in inanimate materials and equipment but is also invested or employed in labor, skill and management. The appellant is a corporation. As such, it contributes to its business no human attributes such as skill and management. Its affairs are necessarily conducted by officers and employees. Its funds are invested or employed in the payment of compensation to these people, as well as in payment for plant and equipment. To the former purpose, a part of its so-called "working capital" is devoted.

Conceding, for the sake of argument, that capital is not invested or employed in both factors mentioned and that the Company's receipts are derived *solely* by reason of the investment of capital, yet the use of the words "investment of capital" does not exclude that portion of receipts attributable to skill and

management. To so hold would require that the definition be read as follows: "Receipts *solely* by reason of the investment of capital." In the appellant's case, skill and management without the investment or employment of capital would produce nothing.

The Seattle City Council is not alone in the use of this criticized phrase. In *State v. Central Trust Co.*, 106 Md. 268, 67 Atl. 267, the term "gross earnings", as used in a statute imposing a franchise tax on certain corporations, was construed to embrace all receipts "derived *from the use of its capital* in the transportation business." In a New York tax law, construed in *People v. Gaus*, 199 N. Y. 147, 92 N. E. 230, "gross earnings" was defined by the court "as all receipts *from the employment of capital* without any deduction." Also, in *People v. Sohmer*, 147 N. Y. S. 726, and *People v. Saxe*, 165 N. Y. S. 938, it was held that "gross earnings" "means all receipts *from the employment of capital* without deduction."

(C) Since all of Appellant's Receipts Accrue from the Sale of its Service, it Obtains no Receipts from the Use as Such of its Real Property. Any Indefiniteness in the Clause "Excluding Receipts or Proceeds from the Use * * * of Real Property" is, Therefore, not Before the Court. If Material, However, and Unconstitutionally Indefinite, the Clause May be Disregarded.

Exception is next taken to the parenthetical clause, excluding from receipts by reason of investment of capital in the business "the receipts or proceeds from

the *use* or sale of real property." The appellant would apply this matter as permitting it to deduct from its gross receipts the value of the use of its realty. With what warrant it seeks so to do, we know not. Certainly it obtains no such receipts or proceeds from its telephone and telegraph rate or toll payers. Receipts from that source are paid and received for telephone or telegraph service rendered, not for the use of realty. If any receipts are paid and received as compensation for the use of realty, the record is silent about it.

Again, if the appellant was the lessee of its realty, the rent in payment of the use of the realty would be one of its *costs* or *expenses* of operation. The use of the same realty under its own ownership does not transform the reasonable value thereof from an operating cost or charge to *receipts* for the use. Whether owned or leased, the value of the use, ascertainable or not, is a charge or expense in furnishing service, and as such, it may not, under the concluding portion of the definition, be deducted as a *receipt* from "*receipts*".

The exclusion of "receipts or proceeds" from the *use* of realty encompasses realty rents, and compensation, by whatever name, for easements of all kinds, and licenses in respect of realty. The obvious purpose is to avoid as much, and as practically, as possible the imposition of further tax burdens on real property in harmony with the popular will expressed in the adoption by the initiative method of an act limiting the taxation of such property to forty mills on the dollar

of assessed valuation thereof (Laws of Washington, 1933, Ch. 4).,

That the exemption was not intended to exclude what appellant pleases to call *receipts* from the use of its realty is implied from the failure to lay down in the ordinance any method of arriving at the value of the use of realty.

If the parenthetical matter: "(excluding receipts or proceeds from the use or sale of real property or any interest therein * * *)" is so vague, indefinite or uncertain that its meaning cannot be reasonably fathomed, it is of no avail to appellant, even though applicable to it. The exemption is of no controlling importance. If its retention means defeat for the whole ordinance, the main purpose — the collection of *presently vital revenues* — is thwarted. It is reasonable and proper, therefore, to proceed upon the assumption that the Council would have adopted the ordinance without the questioned exemption in view of the following provision:

> "Section 23. *Effect of Partial Invalidity*: If any provision or section of this ordinance shall be held void or unconstitutional, all other parts, provisions and sections of this ordinance not expressly so held to be void or unconstitutional shall continue in full force and effect." (R. 24)

Such a course is not without precedent.

In *Utah Pr. & Lt. Co. v. Pfost*, 286 U. S. 165, 76 L. ed. 1038, an Idaho statute imposing a privilege tax upon the generation for sale of electrical energy, measured by the amount of such energy produced for sale, contained a section exempting from the measure

of the tax so much energy as was sold for pumping water for irrigation purposes in the state, the consumer to receive the benefit of the exemption in the form of a credit on his bill. It was asserted that the exemption, because of the provision for credit to the consumer was void and carried to destruction the whole statute which without the exemption once failed of passage by the legislature. This Court, after calling attention to an included provision that an adjudication of invalidity of any provision should not affect the validity of the act as a whole, or of any provision or section thereof, said through Mr. Justice Sutherland (286 U. S. 185):

> "It fairly may be assumed that the Idaho legislature, in making this declaration, had in mind every provision of the act, including §5. The primary object of the statute under review, plainly, is to raise revenue. The exemption made by §5 and the provisions for carrying that exemption into effect are secondary. We find no warrant for concluding that the legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective. On the contrary, it seems entirely reasonable to suppose that if the legislature had expressed itself specifically in respect of the matter, it would have declared that the tax, being the vital aim of the act, was to be preserved even though the specified exemptions should fall for lack of validity (citing *Marshall Field & Co. v. Clark*, 143 U. S. 649, 696, 697, 36

L. ed. 294, 311; *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N. Y. 48, 60-63, 129 N. E. 202)."

See also

State v. St. Louis, 241 Mo. 231, 247, 145 S. W. 801;

Northwestern Mut. Life Ins. Co. v. Lewis & C. County, 28 Mont. 484, 72 Pac. 982;

State v. Santee, 111 Ia. 1, 82 N. W. 445.

Such is the effect of partial invalidity of an act or ordinance in Washington.

State ex rel. French v. Clausen, 107 Wash. 667, 182 Pac. 610;

Northern Cedar Co. v. French, 131 Wash. 394, 416, 417, 230 Pac. 837.

(D) The Penalty Provisions Apply Only to Intentional Wrong. In any Event, The Provisions Should not Render the Tax Provisions of the Ordinance Void.

Appellant is exercised over the penalties for disobedience, and states that it must *guess* at "gross income" at the risk of incurring heavy fine and imprisonment (Br. pp. 10,11). Undue alarm is expressed, for it appears in Section 22 of the ordinance that "It shall be unlawful * * * for any person to make any *false or fraudulent* application or return or any *false* statement or representation in, or in connection with, any such application or return, or to aid or abet another in any attempt to *evade* payment of the fee or tax, or any part thereof, * * * or to testify *falsely* upon any investigation of the correctness of a return,

or upon the hearing of any appeal, * * *" (R. 24). Mere mistake is not a violation. Under the rule of strict construction in favor of the accused in a criminal prosecution, there must be an intent to deceive, since the word "false" and the word "fraudulent" both imply intent.

State v. Case, 88 Wash. 664, 667, 153 Pac. 1070;

State v. Coolidge, 72 Wash. 42, 46, 129 Pac. 1088.

After all, the taxpayer ascertains and reports the amount of his own "gross income" (R. 20, Sec. 10). If any disagreement arises over the amount of the tax, or the amount or items of gross income, settlement of such differences may be had upon appeal to the City Council (R. 23, Sec. 19). *Plymouth Coal Co. v. Pa.*, 232 U. S. 531, 58 L. ed. 713. To a well intentioned taxpayer, the risk of incurring penalties is *nil.*

If this be not so, and it is determined that the definition is too vague to support a criminal penalty, and yet sufficient to afford a rule of conduct otherwise, the penalty should be stricken since the ultimate and sole object of the ordinance is revenue.

Utah Pr. & Lt. Co. v. Pfost, 286 U. S. 165, 185, 76 L. ed. 1038, 1048;

Marshall Field & Co. v. Clark, 143 U. S. 649, 696, 697, 36 L. ed. 294, 311;

People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N. Y. 48, 60-63, 129 N. E. 202;

State v. St. Louis, 241 Mo. 231, 145 S. W. 801;

N. W. Mutual L. Ins. Co. v. Lewis & Clark County, 28 Mont. 484, 72 Pac. 982;
State ex rel. French v. Clausen, 107 Wash. 667, 182 Pac. 610.

General Observations

For purposes of comparison, it is not amiss to invite attention to a few only of the many cases in which the use of words and phrases of more or less indefinite import have received judicial sanction:

A statute making criminal the grazing of sheep "upon any range usually occupied by any cattle grower". *Omaechevarria v. Idaho*, 246 U. S. 343, 62 L. ed. 763.

A statute requiring innkeepers in case of fire "to do all in their power to save such guests and inmates". *Miller v. Strahl*, 239 U. S. 426, 60 L. ed. 364.

An anti-trust statute denouncing contracts and arrangements "reasonably calculated" to fix and regulate prices, and acts which "tend to accomplish" the prohibited results. *Waters-Pierce Oil Co. v. Tex.*, 212 U. S. 86, 53 L. ed. 417.

The Act of July 2, 1890 (26 Stat. at L. 209, Chap. 647) denouncing contracts and combinations which by reason of intent or of the inherent nature of the contemplated acts prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. *Nash v. U. S.*, 229 U. S. 373, 57 L. ed. 1232.

A Washington statute making criminal the publishing or distribution of printed matter tending to

encourage or advocate disrespect for law. *Fox v. Washington*, 236 U. S. 273, 59 L. ed. 573.

A criminal statute directed against a person who exposes meat for sale "and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements". *Hygrade Prov. Co. v. Sherman*, 266 U. S. 497, 69 L. ed. 402.

A criminal statute prohibiting the use of any vehicle or object "of such weight * * * as to destroy or permanently injure" the street, road or highway. *State v. Brown*, 108 Wash. 205, 182 Pac. 944.

A criminal syndicalism act containing "or which will tend to encourage disrespect for the law". *State v. Hennessy*, 114 Wash. 351, 195 Pac. 211.

If courts should insist upon the absolute in the phrasing of revenue measures, we venture to say that neither the United States, the States, nor any other taxing unit could survive. Mr. Justice Sutherland remarked in the *Pfost* case, *supra* (286 U. S. 190, 191):

> "If, for example, absolute exactness of determination in respect of net income, deductions, valuation, losses, obsolescence, depreciation, etc., were required in cases arising under the federal income tax law, it is safe to say that the revenue from that source would be much curtailed. The law, which is said not to require impossibilities, must be satisfied, in many of its applications, with fair and reasonable approximations."

If, in considering constitutionality, all revenue measures were restricted to the nicety and preciseness

indicated by the Supreme Court of Texas as quoted at page 11 of appellant's brief, it would be interesting to speculate upon the fate of the Federal and State income tax laws.

CONCLUSION

We are filing briefs in related cases entitled *Puget Sound Power & Light Co. v. Seattle* (No. 344, October Term, 1933) and *Seattle Gas Co. v. Seattle* (No. 359, said term) involving the same or similar questions concerning Seattle Ordinance No. 62662. All will probably be heard together. If proper, we desire that the applicable arguments and authorities there presented be considered as made and presented here.

For the reasons there set forth, and urged herein, the judgment of the Supreme Court of Washington in this case should be affirmed.

Respectfully submitted,

A. C. VAN SOELEN,
Corporation Counsel,
WALTER L. BAUMGARTNER,
Assistant,
C. V. HOARD,
Counsel for Appellees.

515 County-City Building,
Seattle, Washington.
December, 1933.

SUPREME COURT OF THE UNITED STATES.

No. 364.—October Term, 1933.

The Pacific Telephone and Telegraph Company, Appellant, *vs.* City of Seattle and Harry W. Carroll, as Comptroller, etc.	Appeal from the Supreme Court of the State of Washington.

[February 5, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal under § 237 of the Judicial Code from a judgment of the Supreme Court of the State of Washington, 172 Wash. 649, sustaining a state license or excise tax assailed by appellant upon numerous state and federal grounds. The only one urged here is that the statutory measure of the tax as applied to appellant is so vague and indefinite as to infringe the due process clause of the Fourteenth Amendment.

An ordinance of the Seattle city council, of May 23, 1932, imposes annual license taxes on the privilege of carrying on various classes of business. One such is the telephone business upon which the tax is 4% of the "gross income" of the business "in the city" during the preceding fiscal year. The definition of gross income by § 2 is printed in the margin.[1] By § 10, the taxpayer is required annually to make application to the city comptroller for an "occupation license" for the ensuing year "upon blanks or

[1] Section 2. Definitions: . . .

"Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

forms to be prepared by him requiring such information as may be necessary to enable him to arrive at the lawful amount of the fee or tax". By § 20 the comptroller is required to make rules and regulations having the force of law for carrying the ordinance into effect. Payment of the full tax or a monthly or quarterly installment of it is required on filing the return.

The cause was heard and decided on demurrer to appellant's bill of complaint asking an injunction to restrain the collection of the tax. The bill was filed shortly after the enactment of the ordinance. It alleges that the appellant, a California corporation, derives its receipts and earnings from the conduct of a telephone business, both interstate and intrastate, carried on within and without the City of Seattle, by the use of its telephone exchanges, wires, poles, conduits and other property located in Seattle and also outside of Seattle, both within and without the state. It charges that the ordinance is vague and indefinite, in that it fixes no method of computation whereby appellant, with reasonable certainty, can segregate its interstate business or so much of its intrastate business as is conducted within the City of Seattle, and that the definition of gross income set out in § 2 is so vague and uncertain as to make it impossible for appellant to compute with reasonable certainty the amount of the tax.

The bill of complaint does not show whether appellant had applied for its occupation license or had received from the comptroller the prescribed form of return specifying the information which would be required by him for the computation of the tax or whether the comptroller had prepared such a form at the time when the bill was filed. It fails to show whether the comptroller had promulgated rules or regulations for carrying the ordinance into effect or whether appellant had requested of him any ruling, interpreting the ordinance, which would aid in preparing the return required for the computation of the tax. On the argument before us appellant admitted that the present suit was brought without waiting for the preparation of forms and regulations and that it had made no effort to secure an administrative interpretation of the ordinance.

The state court, in disposing of the attack upon the uncertainty of the statute, contented itself with saying that "gross income"

is a proper basis for determining the amount of a tax; that the objections raised by the appellant are "more fanciful than real;" and that "in practical application under present day systems of accounting appellant will have no serious difficulty in ascertaining the amount of the tax it is required to pay".

Despite this conclusion of the state court that the taxing act can be given a practical construction we are asked to say that the statute is unconstitutional because of its vagueness. It may be conceded that the definition by the ordinance of taxable "gross income" is not free from ambiguities or difficulties of construction. But in the present posture of the case we are called upon neither to resolve them nor to say whether they can be resolved.

The ordinance allows wide latitude for administrative construction, both by the provision which requires the comptroller to make interpretative rules and regulations, and that which commands him to prepare the form for the return on the basis of which the tax is to be computed. Until the form is prepared the most that can be required of taxpayers is that they apply for the license and for the form on which to make their tax returns. Without the return there can be no tax and no penalty can be imposed for its nonpayment. Thus the ordinance does not purport finally to define the duty of taxpayers. Instead it directs that an administrative officer shall mark the scope of the obligation, and only then does the state compel obedience to its mandate.

In this we see no invasion of constitutional immunity. Compare *In re Kollock*, 165 U. S. 526; *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194. The Fourteenth Amendment does not require that legal duties shall be defined by any particular agency of the state government. *Dreyer* v. *Illinois*, 187 U. S. 71, 83; *Soliah* v. *Heskin*, 222 U. S. 522, 524; *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, 443; *O'Donoghue* v. *United States*, 289 U. S. 516, 545; cf. *Pacific States Telephone & Telegraph Co.* v. *State of Oregon*, 223 U. S. 118. The demands of due process are satisfied if reasonably clear definition is afforded in time to give the taxpayer an opportunity to comply. *Connally* v. *General Construction Co.*, 269 U. S. 385, 391. Before the duties of the administrative officer are performed we cannot say that the ordinance falls short of that requirement. At this stage appellant can show

no more than apprehension that the definition which the administrative officer will lay down may be deficient. The Constitution can not allay that fear. Compare *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249, 253.

The decision of the state court must be affirmed, not because the appellant has failed to exhaust its administrative remedies, which would concern us only if the suit had been brought in a federal court of equity, but because without administrative action, which has not occurred, there can be no infringement of the immunity invoked.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.